Petition

81-1784

No.

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ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals has jurisdiction to consider a petition for review of an order of the Occupational Safety and Health Review Commission filed by a union which had intervened in administrative enforcement proceedings brought against an employer by the Secretary of Labor, where no other party has sought review.

2. Whether the Occupational Safety and Health Review Commission may participate as an active party in a court of appeals on a petition for review of one of its orders.

3. Whether the failure to name in timely fashion any proper party as a respondent in a petition for review of an order of the Occupational Safety and Health Review Commission precludes the court of appeals from acquiring jurisdiction to review the order.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	6
1. Authority of a union intervenor to seek review of a Commission decision	6
2. Authority of the Commission to participate as a party in judicial review of its decisions	9
3. Failure to file a proper petition for review in timely fashion	11
CONCLUSION	15

TABLE OF AUTHORITIES

CASES: Page

Atlas Roofing Co. v. *OSHRC*, 430 U.S. 442 (1977).. 9
Brennan v. *Gilles & Cotting, Inc.*, 504 F.2d 1255 (4th Cir. 1974) 10
Brennan v. *OSHRC and Bill Echols Trucking Co.*, 487 F.2d 230 (5th Cir. 1973) 10
Brennan v. *OSHRC and Santa Fe Trail Transport Co.*, 505 F.2d 869 (10th Cir. 1974) 10
Brennan v. *Southern Contractors Service*, 492 F.2d 498 (5th Cir. 1974) 10
Cook & Sons Equipment, Inc. v. *Killen*, 277 F.2d 607 (9th Cir. 1960) 14
Consolidated-Andy, Inc. v. *Donovan*, 642 F.2d 778 (5th Cir. 1981) 12
Dale M. Madden Construction, Inc. v. *Hodgson*, 502 F.2d 278 (9th Cir. 1974) 10
Diamond Roofing Co. v. *OSHRC and Usery*, 528 F.2d 645 (5th Cir. 1976) 10
Dunlop v. *Don L. Cooney, Inc.*, 3 O.S.H. Cas. (BNA) 1109 (9th Cir. 1975) 10
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 11
G.E. Smith & Associates, Inc. v. *Otis Elevator Co.*, 608 F.2d 126 (5th Cir. 1979) 14
General Electric Co. v. *OSHRC*, 583 F.2d 61 (2d Cir. 1978) 10
Hoerner Waldorf Pan American Bag Co. v. *OSHRC*, 614 F.2d 795 (1st Cir. 1980) 12
In re Orbitec Corp., 520 F.2d 358 (2d Cir. 1975).... 14
Life Time Doors, Inc. v. *Walled Lake Door Co.*, 505 F.2d 1165 (6th Cir. 1974) 14
Linda R. S. v. *Richard D.*, 410 U.S. 614 (1973)..... 9
Marshall v. *OCAW and OSHRC*, 647 F.2d 383 (3d Cir. 1981) 7
Marshall v. *OSHRC and OCAW*, 635 F.2d 544 (6th Cir. 1980) 7, 10
Marshall v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980).....6, 7, 8, 10, 11

TABLE OF AUTHORITIES—Continued

	Page
Midway Industrial Contractors, Inc. v. *OSHRC*, 616 F.2d 346 (7th Cir. 1980)	12, 13
NLRB v. *OCAW*, 476 F.2d 1031 (1st Cir. 1973)	8
Penwell v. *Newland*, 180 F.2d 551 (9th Cir. 1950)	14
Princeton University v. *Schmid*, 50 U.S.L.W. 4159 (U.S. January 13, 1982)	9
UAW v. *OSHRC*, 557 F.2d 607 (7th Cir. 1977)	7
United States v. *Bankers Trust Co.*, 294 U.S. 240 (1935)	10
United States v. *Fornea Road Boring Co.*, 565 F.2d 1314 (5th Cir. 1978)	12
Van Hoose v. *Eidson*, 450 F.2d 746 (6th Cir. 1971)	14
STATUTES:	
28 U.S.C. § 1254(1)	2, 10
28 U.S.C. § 2107	13
The Occupational Safety and Health Act of 1970	
Section 5(a)(1), 29 U.S.C. § 654(a)(1)	4
Section 9, 29 U.S.C. § 658	3
Section 10, 29 U.S.C. § 659	3
Section 10(c), 29 U.S.C. § 659(c)	2, 5, 6, 7, 8
Section 11(a), 29 U.S.C. § 660(a)	3, 4, 5, 6, 13
Section 11(b), 29 U.S.C. § 660(b)	4
RULES AND REGULATIONS:	
Federal Rules of Appellate Procedure	
Rule 4(a)	13, 14
Rule 4(a)(5)	13, 14
Rule 15(a)	13
Rule 15(d)	4
Rule 20	14
Rule 26(b)	14
Federal Rules of Civil Procedure	
Rule 15(c)	13
29 C.F.R. § 2200.33(a)	3
29 C.F.R. § 2200.33(b)	3
29 C.F.R. §§ 2200.51-2200.90	3

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS:

Moran, *Parties to Proceedings in the Court of Appeals Under the Occupational Safety and Health Act of 1970*, 15 B.C. Indus. & Com. L. Rev. 1089 (1974) 10

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Cyanamid Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

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[1] The Occupational Safety and Health Review Commission was named as the sole respondent in the original petition filed in the court of appeals by the respondents here. The Secretary of Labor participated in the proceedings in the court of appeals as *amicus curiae*.

American Cyanamid Company has no parent companies, subsidiaries (except wholly-owned subsidiaries), or affiliates, other than those listed in the addendum, *infra*, at 16. See Rule 28.1 of the Rules of this Court.

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. It is reported unofficially at 50 U.S.L.W. 2524 and at 10 O.S.H. Cas. (BNA) 1345. The opinion of the Occupational Safety and Health Review Commission is reported at 9 O.S.H. Cas. (BNA) 1596. The opinion of the Administrative Law Judge is unreported. These opinions are reprinted in the separate Appendix as Appendices A, B, and C, respectively.

JURISDICTION

The judgment of the court of appeals (Appendix D in the separate Appendix) was entered on February 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 10(c) of the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. § 659(c) (1976)), provides in pertinent part:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days

> after its issuance. . . . The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

Section 11(a) of the Occupational Safety and Health Act (codified at 29 U.S.C. § 660(a) (1976)) provides in pertinent part:

> Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside.

STATEMENT

The decision of the U.S. Court of Appeals for the D.C. Circuit sustained against a jurisdictional challenge a petition brought by respondents Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW") for judicial review of an order of the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission"). The proceedings before the Commission concerned a citation issued by the Secretary of Labor (the "Secretary") to petitioner American Cyanamid Company ("Cyanamid"). The Secretary alleged in a complaint filed with the Commission[2] that a

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[2] Under the Commission's rules of practice, when an employer files with the Secretary a notice of contest to a citation, the Secretary must file a complaint with the Commission which, among other things, states the basis for jurisdiction and avers facts supporting the alleged violation. *See* 29 C.F.R. § 2200.33(a). *Compare* 29 U.S.C. §§ 658, 659. An answer is then filed by the employer, and the case proceeds to disposition before an Administrative Law Judge of the Commission. *See* 29 C.F.R. §§ 2200.33(b), 2200.51-2200.90.

violation of the general duty clause, Section 5(a)(1), of the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. § 654(a)(1), had occurred at Cyanamid's Willow Island, West Virginia plant.[3] OCAW was permitted to intervene in the proceedings as the authorized employee representative of some of the employees at Cyanamid's plant. An Administrative Law Judge dismissed the complaint, and the Commission affirmed, holding that the complaint failed to allege a violation arising under the Act.[4] To pursue the case further, under Section 11(b) of the Act the Secretary would have had to file a petition for review in either the U.S. Court of Appeals for the Third Circuit (where Cyanamid has its principal office) or for the Fourth Circuit (where the violation is alleged to have occurred). However, the Secretary did not seek review. Nonetheless, OCAW did file a petition with the U.S. Court of Appeals for the D.C. Circuit, claiming jurisdiction under Section 11(a) of the Act and naming only the Commission as a respondent. It joined neither the Secretary nor Cyanamid as parties.

Within the thirty-day period for intervention specified by Fed. R. App. P. 15(d), Cyanamid in effect filed a

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[3] The allegations related to a policy which precluded female employees of childbearing capacity from being assigned to, bidding into, or holding any production job at that plant which involved occupational exposure to lead in excess of specified levels. The policy reflected Cyanamid's concern about the well-documented dangers lead poses for unborn children in the workplace at levels of exposure considered safe for adults.

[4] The Administrative Law Judge granted a motion by Cyanamid for summary judgment and dismissed the complaint on two independent grounds: (1) that the complaint was barred by the Act's six-month statute of limitations, and (2) that actions of the Equal Employment Opportunity Commission and the National Labor Relations Board preempted the Secretary's jurisdiction over the hazard alleged by the complaint. (App. C at 57a-62a.) The Commission granted discretionary review of the ALJ's decision and affirmed it on yet a third ground: that the complaint failed to allege a hazard arising under the Act. (App. B at 32a.)

"special appearance" in the court of appeals. Cyanamid moved in the court of appeals (1) for leave to participate as an *amicus curiae* and to file a suggestion of lack of case or controversy, and (2) conditionally, depending upon the result of the jurisdictional suggestion, for leave to intervene. Jurisdictionally, Cyanamid argued that the petition for review presented no case or controversy, that the Act did not give OCAW the right to appeal a Commission order dismissing a complaint, that OCAW lacked standing, and that the only named respondent, the Commission, was merely a nominal party and could not actively defend its order. Subsequently, after the statutory period for filing a petition for review had expired, OCAW moved to amend the petition to add Cyanamid as a party respondent. The court of appeals deferred briefing of the substantive issues in the case pending its decision on the jurisdictional controversy.[5] After briefing and oral argument before a panel comprised of Judges Wald, Mikva, and Edwards, the court of appeals in a *per curiam* opinion issued on February 26, 1982 ruled that it had jurisdiction to consider the petition and ordered it amended to name proper parties.

Specifically, the court of appeals concluded that OCAW's filing of the petition for review was proper under Sections 10(c) and 11(a) of the Act and that OCAW had standing. While the court decided that the Commission was not a proper party respondent and could not actively defend its decision before the court of appeals, it did not dismiss the petition for review, but rather granted OCAW's motion to add Cyanamid as a respondent and related the motion back to the date on which the petition for review had been filed. (App. A at 20a.)

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[5] The court granted OCAW's unopposed motion to defer briefing. After the court of appeals' decision on February 26, 1982, Cyanamid moved further to defer briefing pending resolution by this Court of a petition for writ of certiorari. The court of appeals granted this motion on March 12, 1982.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect. Perhaps more meaningfully for this Court, however, there is a conflict in decisions of the circuits respecting *each* of the three questions raised. This one case accordingly provides the Court with an opportunity to resolve three separate jurisdictional and procedural issues important to the administration of the Occupational Safety and Health Act.

1. Authority of a union intervenor to seek review of a Commission decision.

The holding of the D.C. Circuit regarding the ability of OCAW to seek review is in sharp conflict with the opinions of the Third, Sixth, and Seventh Circuits. The D.C. Circuit held that a union intervenor in enforcement proceedings before the Commission against an employer may, independently of the Secretary, seek review of a decision of the Commission with respect to issues other than the reasonableness of the abatement period. No other circuit supports this position. Each of the other circuits that has considered the question has held that in an enforcement case brought by the Secretary against an employer a union is not generally accorded by the Act any right to pursue the enforcement case independently of the Secretary. The other circuits have pointed especially to the Secretary's role as the exclusive prosecutor of violations under the Act. In their view, the limited exception in Sections 10(c) and 11(a) of the Act gives the union a right to independent action *only* insofar as the reasonableness of the abatement period for a violation is concerned.

The leading case is *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980). There the Third Circuit denied OCAW's petition for review of a Commission decision where

OCAW sought to argue that a settlement agreement between the Secretary and an employer failed to abate the alleged hazard. Relying on Section 10(c) of the Act, the court declined to hear OCAW's arguments, stating "we . . . reject the union's contention that affected employees have a right to be heard on matters other than the reasonableness of the abatement period." 622 F.2d at 1186. Similarly, in *Marshall* v. *OCAW and OSHRC*, 647 F.2d 383 (3d. Cir. 1981), a case also involving Cyanamid, the Third Circuit held that because of Section 10(c), OCAW had no standing to contest a settlement agreement's recitation that abatement had already occurred.

The Sixth and Seventh Circuits have reached comparable results based on a parity of reasoning. In *Marshall* v. *OSHRC and OCAW*, 635 F.2d 544 (6th Cir. 1980), the Sixth Circuit held that OCAW had no right to prosecute a citation withdrawn by the Secretary, in part because Section 10(c) allows employees to contest only the reasonableness of the abatement period. And in *UAW* v. *OSHRC*, 557 F.2d 607, 610 (7th Cir. 1977), the Seventh Circuit held that a union could not address the sufficiency of the abatement plan submitted by the employer in that case, again because Section 10(c) permitted the Commission and the court of appeals to consider employee arguments only with respect to the reasonableness of the period of time fixed in the citation for the abatement of the violation.

In its holding in this case, the D.C. Circuit completely disregarded these cases:

> We therefore conclude that an employee can seek judicial review of OSHRC action in two situations: when the employee seeks to challenge a decision from an OSHRC proceeding which he initiated to contest the reasonableness of the abatement period, *and when the employee seeks to challenge a decision from*

> *an OSHRC proceeding in which he elected party status pursuant to Commission Rule § 2200.20.*
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> App. A at 11a (emphasis added, footnote omitted).

The D.C. Circuit focused on the last sentence of Section 10(c), which authorizes employees to "participate as parties" in hearings before the Commission regarding an alleged violation. The court refused to acknowledge any limitations on this party right, notwithstanding the Secretary's exclusive enforcement role and other provisions of Section 10(c) which specifically contemplate such limitations.[6]

The degree of conflict between the circuits is dramatically demonstrated by the fact that most of the D.C. Circuit's opinion on this issue is taken virtually word for word from the opinion of the dissent in *Marshall* v. *Sun Petroleum Products Co.*, *supra*. *Compare Sun Petroleum*, 622 F.2d at 1188-91 (Pollak, J., concurring and dissenting), *with* App. A at 6a-9a, 11a n.6.[7] The decision of the majority of the Third Circuit deserved more credence, being consistent both in reasoning and result with the aforementioned other decisions of the Third, Sixth, and Seventh Circuits.

It is important that the Court resolve this conflict because it strikes at the heart of the Secretary's role as

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[6] The D.C. Circuit did not address Cyanamid's argument that under Section 10(c) of the Act OCAW had limited rights and was not authorized to act as "the alter ego of the [government] or the equivalent of a civil litigant." *NLRB* v. *OCAW*, 476 F.2d 1031, 1036 (1st Cir. 1973) (Coffin, C.J.). In this type of litigation OCAW's role was that of a "gadfly insuring that the [agency] considers all relevant facts and acts in the public interest . . . ." *Id.* Contrary to the D.C. Circuit's decision, this "gadfly" role does not enable OCAW to step into the Secretary's shoes as the enforcer of the Act.

[7] Oddly enough, Judge Pollak's dissent in *Sun Petroleum* is not cited anywhere in the D.C. Circuit's opinion.

exclusive prosecutor under the Act. Enforcement actions brought by the Secretary are "cases in which 'public rights' are being litigated . . . , cases in which the Government sues in its sovereign capacity to enforce public rights." *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977). And generally, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). *Cf. Princeton University* v. *Schmid*, 50 U.S.L.W. 4159 (U.S. January 13, 1982). But in this case, the court of appeals allowed a private entity to usurp the Secretary's role as exclusive prosecutor by seeking review of the dismissal of an enforcement action. The Act does not provide that representatives of employees may take over the Secretary's prosecutorial role, either at the administrative level or at the level of judicial review.

Perhaps recognizing the unprecedented nature of its decision, the D.C. Circuit attempted to mitigate OCAW's usurpation of the Secretary's role by manufacturing out of whole cloth two conditions on OCAW's ability independently to seek reversal of Commission decisions: (1) that OCAW must notify the Secretary of its petition for review, so that the Secretary may intervene if he deems it appropriate; and (2) that the petition may be mooted if the Secretary unconditionally states that he would not renew the prosecution regardless of the outcome of the judicial review. (App. A at 14a.) These conditions have no basis in the statute, and serve only to emphasize the incompatability of the D.C. Circuit's decision with the statutory provisions.

2. Authority of the Commission to participate as a party in judicial review of its decisions.

The D.C. Circuit correctly held that the Act precludes the Commission, as a purely adjudicatory agency, from independent representation in judicial proceedings to re-

view its decisions. (App. A at 15a.)[8] Yet as the court noted, "[t]he circuits are sharply divided on the question of whether the commission is a proper party to an OSHA appeal." *Id.* This Court should resolve the conflict.

Besides the D.C. Circuit in the instant case, three circuits have held that the Commission has no authority to participate in judicial review of its decisions. *Marshall* v. *Sun Petroleum Products Co., supra,* 622 F.2d at 1180-84 (3d. Cir. 1980); *Marshall* v. *OSHRC and OCAW, supra,* 635 F.2d at 547 (6th Cir. 1980); *Dale M. Madden Construction, Inc.* v. *Hodgson,* 502 F.2d 278, 280-81 (9th Cir. 1974); *Dunlop* v. *Don L. Cooney, Inc.,* 3 O.S.H. Cas. (BNA) 1109 (9th Cir. 1975). The Second and Tenth Circuits have stated this position in dicta. *General Electric Co.* v. *OSHRC,* 583 F.2d 61, 63 n.3 (2d Cir. 1978); *Brennan* v. *OSHRC and Santa Fe Trail Transport Co.,* 505 F.2d 869, 871 (10th Cir. 1974). *See also* Moran, *Parties to Proceedings in the Court of Appeals Under the Occupational Safety and Health Act of 1970,* 15 B.C. Indus. & Com. L. Rev. 1089 (1974).

The Fourth and Fifth Circuits disagree and hold that the Commission may appear and participate in the courts of appeals. *Brennan* v. *Gilles & Cotting, Inc.,* 504 F.2d 1255, 1266-67 (4th Cir. 1974); *Diamond Roofing Co.* v. *OSHRC and Usery,* 528 F.2d 645, 648 n.8 (5th Cir. 1976); *Brennan* v. *Southern Contractors Service,* 492 F.2d 498, 499 n.2 (5th Cir. 1974); *Brennan* v. *OSHRC*

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[8] While Cyanamid prevailed on this issue in the D.C. Circuit, presentation of this question to the Court is necessary for the Court to address also a further question in the case. See *infra,* at 11-14, discussing question 3 posed by this petition for a writ of certiorari. Invocation of this Court's certiorari jurisdiction over a court of appeals by a successful party is appropriate under 28 U.S.C. § 1254(1), which allows "any party" to a case in a court of appeals to apply for a writ of certiorari. *See United States* v. *Bankers Trust Co.,* 294 U.S. 240, 243 (1935).

and Bill Echols Trucking Co., 487 F.2d 230, 232 (5th Cir. 1973).

The legislative history and the statutory scheme with respect to this issue are discussed fully in *Marshall* v. *Sun Petroleum Products Co., supra*, 622 F.2d at 1180-84. (See App. A at 16a n.11.) Briefly, the legislative history shows that Congress created the Commission as a compromise between supporters of creating an independent board which would both adopt occupational safety and health standards and adjudicate enforcement cases, and supporters of vesting in the Secretary both the power to adopt standards and to hear enforcement cases. Congress allocated all policymaking authority to the Secretary, including the power to adopt and enforce standards, and created the Commission as an independent agency exclusively to decide enforcement cases brought by the Secretary. Lacking a policy role in administering the Act, the Commission has no interest in defending its decisions in the courts of appeals. In effect, the Commission resembles a district court, which may not actively defend its judgments before the courts of appeals.

Currently the Commission faces a dilemma: in two circuits it is encouraged to participate in judicial review of its decisions, in four circuits it may not participate, and in the others no clear rule applies. Resolution of this conflict would remove a procedural question which has vexed the courts of appeals in their consideration of petitions to review the Commission's decisions. The issue also has matured through full consideration by the courts of appeals, and is ripe for decision by this Court. *Cf. E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).

3. Failure to file a proper petition for review in timely fashion.

In its decision in this case, the D.C. Circuit created an excusable-neglect exception to the requirement that a person seeking review of a Commission decision must file a

proper petition for review within sixty days of the Commission's decision. The court found that by naming only the Commission as a respondent, the petition was defective because it failed to name a proper respondent. (App. A. at 19a-20a.) Rather than "penalize the union for its mistake in naming the OSHRC as respondent" (App. A at 20a), however, the court treated OCAW's untimely motion to add Cyanamid as a respondent "as one which relates back to the date on which the petition for review was filed." *Id.* (footnote omitted). This decision conflicts with the decisions of three other circuits that the failure to file a proper petition for review of a Commission decision, even for excusable neglect, is a jurisdictional defect precluding consideration of the petition for review. *See Hoerner Waldorf Pan American Bag Co.* v. *OSHRC*, 614 F.2d 795, 796 (1st Cir. 1980); *Consolidated-Andy, Inc.* v. *Donovan*, 642 F.2d 778, 779 (5th Cir. 1981); *United States* v. *Fornea Road Boring Co.*, 565 F.2d 1314, 1316 (5th Cir. 1978); *Midway Industrial Contractors, Inc.* v. *OSHRC*, 616 F.2d 346, 347 (7th Cir. 1980).

The Seventh Circuit's decision in *Midway Industrial Contractors* succinctly explains why the D.C. Circuit erred in declining to "penalize OCAW for its mistake". There the Seventh Circuit described the argument for an exception to the timely-filing requirement:

> The company asks us not to penalize the management of the company who had indicated its desire to obtain judicial review of the order because of the minor error in the lawyer's good faith efforts to implement the company's directive. Thus, the company requests that this Court enter a finding of excusable neglect which would retroactively validate the untimely petition for review. See Federal Rule of Appellate Procedure 4(a).
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> 616 F.2d at 347.

The Seventh Circuit noted that Section 11(a) of the Act conditions the right of an aggrieved person to obtain judicial review of a Commission order on that person's "filing in [an appropriate court of appeals] *within sixty days* following the issuance of such order a written petition praying that the order be modified or set aside." 29 U.S.C. § 660(a) (emphasis added). The court held that such petitions for review under Section 11(a) are governed by Rule 15(a) of the Federal Rules of Appellate Procedure. The Seventh Circuit observed that Fed. R. App. P. 4(a) concerning appeals from district courts in civil cases contains an explicit excusable-neglect provision,[9] but that Fed. R. App. P. 15(a) does not. In the circumstances, the Seventh Circuit refused to read an excusable-neglect exception into Fed. R. App. P. 15(a): "Perhaps an excusable neglect provision similar to that contained in Rule 4(a) should be included in Federal Rule of Appellate Procedure 15, but at present no such procedure for excusing the late filing in these cases exists." 616 F.2d at 347. The court found the time for filing to be jurisdictional and dismissed the late-filed petition for review.

In this case the D.C. Circuit appeared to rely more on Rule 15(c) of the Federal Rules of *Civil* Procedure (governing relation back of amendments to a complaint changing the party against whom a claim is asserted) than on Rule 4(a) of the Federal Rules of Appellate Procedure. (See App. A at 20a and n.15.) But the rule

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[9] Fed. R. App. P. 4(a)(5) provides that a motion to the district court to extend the time for taking an appeal based on a showing of excusable neglect must be filed no later than thirty days after the original appeal time, but that the time for taking an appeal may then be extended to as much as ten days after the date on which the order granting the motion was entered, or thirty days from the original appeal time, whichever occurs later. *See also* 28 U.S.C. § 2107 (fourth paragraph).

of civil procedure has no greater pertinence to the present situation than does Fed. R. App. P. 4(a).[10]

The D.C. Circuit also attempted to distinguish this case, where a petition was filed within sixty days but failed to name any proper respondent, from cases where not even a defective petition was filed until after the sixty-day period. (App. A at 19a.) This is a distinction without a difference, however. It is well established that a defective notice of appeal may not be cured by moving after the jurisdictional period to add a necessary appellant. *See G. E. Smith & Associates, Inc.* v. *Otis Elevator Co.*, 608 F.2d 126, 127 (5th Cir. 1979); *Life Time Doors, Inc.* v. *Walled Lake Door Co.*, 505 F.2d 1165, 1168 (6th Cir. 1974); *Van Hoose* v. *Eidson*, 450 F.2d 746, 747 (6th Cir. 1971); *Cock & Sons Equipment, Inc.* v. *Killen*, 277 F.2d 607, 609 (9th Cir. 1960); *Penwell* v. *Newland*, 180 F.2d 551, 553 (9th Cir. 1950).[11] Neither may a defective petition for review be cured by moving after the sixty-day period to add a necessary respondent.

The D.C. Circuit conceded "that, in similar circumstances, some courts have held that the petition must be dismissed for failure to file timely." (App. A at 19a (footnote omitted).) By failing to follow these other courts, the D.C. Circuit created a serious conflict among the circuits which directly affects the general rule that time limits for filing proper petitions for review are jurisdictional. This Court should resolve that conflict.

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[10] *See* Fed. R. App. P. 20. Indeed, Fed. R. App. P. 26(b) explicitly provides: "[n]or may the court enlarge the time prescribed by law for filing a petition to . . . review . . . an order of an administrative agency . . . , except as specifically authorized by law."

[11] Whether because of the passage of time or other reasons, the excusable-neglect provision, Fed. R. App. P. 4(a)(5) or its predecessors, apparently was not available in these cases. *See generally In re Orbitec Corp.*, 520 F.2d 358, 361-362 (2d Cir. 1975) (opinion by Friendly, J.).

CONCLUSION

The petition for a writ of certiorari should be granted. There is a conflict in decisions among the circuits respecting each of the three issues presented for this Court's review. Resolution of these conflicts would assist courts of appeals in reviewing enforcement actions under the Occupational Safety and Health Act.[12]

Respectfully submitted,

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American Cyanamid Company

* Counsel of record

March 26, 1982

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[12] The Secretary of Labor, in his Statement of Position as *amicus curiae* to the D.C. Circuit in this case, advised that court that the jurisdictional questions were "important" to the interpretation of the Occupational Safety and Health Act. Given the Secretary's interest in these questions, this Court may wish to grant the petition for a writ of certiorari and concurrently invite the Solicitor General to file a brief *amicus curiae* expressing the views of the United States on the issues presented.

AMERICAN CYANAMID COMPANY AFFILIATES AND SUBSIDIARIES NOT WHOLLY OWNED

Agustin A. Balaguer & Cia., Ltda.
Arizona Chemical Company
Arizona Chemical Overseas Corporation
Arizona Chemical Service Corp.
B. Braun—Dexon GmbH
B. Braun—Dexon Ltda.
B. Braun—Dexon S.A.
Brewster Phosphates
Burford Fertilizers Limited
The Catalyst Company
Ceresdale Fertilizers Limited
Chemacryl Plastics Limited
Colfax Laboratories (India) Private Limited
Cyanamid Fothergill Limited
Cyanamid Iberica S.A.
Cyanamid India Limited
Cyanamid Italia S.p.A.
Cyanamid-Ketjen Katalysator B.V.
Cyanamid Taiwan Corporation
Cyanamire S.p.A.
Cyanenka S.A.
CYRO Industries
Societe de Distribution de Stratifies Decoratifs S.A.R.L.
Societe Anonyme Formica
Formica Espanola S.A.
Formica GmbH & Co. KG
Formica Maghreb
Formica Plastics Pty. Limited
Hopewell International Company Ltd.
Kent County Fertilizers Limited
Koch Processes, Ltd.
Laboratorios Layre Limitada
Laminates Industries (Pty.) Limited
Lederle (Japan), Ltd.

Lederle (Nigeria) Limited
Lefrant & Cie.
Les Engrais Chimiques Levis Limitee
(Levis Chemical Fertilizers Limited)
Les Engrais Chimiques Victoria Limitee
(Victoria Chemical Fertilizers Limited)
Mitsui-Cyanamid Limited
Molecular Genetics, Inc.
Realhome Pty. Limited
Ralph Dale Fertilizers Limited
Sherkat Sahami Cyanamid—KBC
Shulton Africa Limited
Shulton South Africa (Proprietary) Limited
Skyway Fertilizers Limited
Societe Anonyme des Produits Industriels Formica
Societe Des Aiguilles Suturex (S.A.R.L.)
Societe des Sutures Chirurgicales Robert & Carriere-
Lederle
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TDF Tiofine B.V.
Tiofine Pigments GmbH
United Insurance Company

Supplemental Brief

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No. 81-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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September 21, 1982

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. Appropriateness for review	2
2. A private prosecutor?	4
3. OSHRC's role	6
4. Improper reliance on the relation-back doctrine	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Christman, et al. v. *American Cyanamid Co.*, Civ. Action No. 80-0024-P (N.D.W.Va., filed January 28, 1980) 5

Crown Simpson Pulp Co. v. *Costle*, 445 U.S. 193 (1980) 3

Davis v. *L.L. Cohen & Co.*, 268 U.S. 638 (1925) 8

Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980) 2, 3, 4

Land v. *Dollar*, 330 U.S. 731 (1947) 3

Local 8-901, Oil, Chemical and Atomic Workers v. *OSHRC, etc.*, No. 79-1828 (3d Cir. 1980) 9

Marshall v. *OSHRC & OCAW*, 635 F.2d 544 (6th Cir. 1980) 5

Marshall v. *OCAW & OSHRC*, 647 F.2d 383 (3d Cir. 1981) 5

Marshall v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980) 5, 6, 9

Mellon v. *Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928) 8

UAW v. *OSHRC*, 557 F.2d 607 (7th Cir. 1977) 5

STATUTES:

28 U.S.C. §1254(1) 7

The Occupational Safety and Health Act of 1970
29 U.S.C. §§ 651-678 2

The Civil Rights Act of 1964
Title VII, 42 U.S.C. §§ 2000e-2000e-17 5

RULES:

Federal Rules of Appellate Procedure
Rule 15(a) 9
Rule 20 9
Rule 26(b) 9

Federal Rules of Civil Procedure
Rule 15(c) 8, 9

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:

Page

Byse, *Suing The "Wrong" Defendant In Judicial Review Of Federal Administrative Action: Proposals For Reform*, 77 Harv. L. Rev. 40 (1963) .. 8

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 4, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1784

AMERICAN CYANAMID COMPANY,
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v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONER

INTRODUCTION

This supplemental brief by petitioner American Cyanamid Company ("Cyanamid") addresses several new points raised in the recently filed Brief for the United States as *Amicus Curiae*.[1]

This case concerns the prosecution of a citation against Cyanamid by the Department of Labor, Occupational Safety and Health Administration ("the Secretary" or "OSHA") before the Occupational Safety and Health Review Commission ("OSHRC" or "the Commission"). The principal question presented here is one of considerable

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[1] The brief for the United States was filed in response to the Court's invitation.

importance to judicial review of actions by the Commission under the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678: Where the Commission dismisses the citation and the Secretary chooses not to seek review in a court of appeals of that dismissal, does a union intervenor have the right to take up and pursue the prosecution by petitioning for review in a court of appeals?

Before turning to this question, and briefly to two lesser issues, a preliminary matter raised by the United States as *Amicus Curiae* ("the Secretary") will be addressed.

1. Appropriateness for review.

Analytically, the Secretary's suggestion that this case may not be ripe for review by this Court (*Amicus* Br. at 8-9) lacks both precision and merit. The D.C. Circuit's judgment constitutes that court's "last word" [2] on the several jurisdictional and procedural issues arising with respect to the power of that court to act in the case. These jurisdictional and procedural issues are neither related to nor intertwined with the substantive issues concerning the merits of the Commission's action. Therefore, ripeness is not at issue.

If there is any question regarding appropriateness for this Court's review, it stems from the interlocutory nature of the D.C. Circuit's decision. Because of the potentially dispositive nature of the jurisdictional issues in this case, the D.C. Circuit had separate briefing and argument on those issues. The decision correspondingly dealt only with that court's power to consider OCAW's petition to review the Commission's dismissal of the government's enforcement action. Promptly after the decision was issued, Cyanamid informed the D.C. Circuit that it would file a petition for certiorari regarding the jurisdictional issues and asked the court of appeals to stay briefing pending disposition by this Court of the petition for

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[2] *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 586 (1980).

certiorari. The D.C. Circuit granted this motion on March 12, 1982. Accordingly, this petition for certiorari bears on interlocutory matters; briefing of the substantive issues thus far has been stayed in the court of appeals.

The interlocutory nature of the proceedings is nonetheless not a factor which here should lead this Court to deny the petition for certiorari.[3] As noted, any future proceedings in the court of appeals would neither further illuminate nor define the issues now before this Court. The court of appeals would not have any occasion to revisit or reconsider the jurisdictional issues.[4]

Moreover, and perhaps more importantly from this Court's perspective, the Secretary's suggested attitude toward review of jurisdictional issues would engender an unwarranted bias in the courts of appeals toward an expansion of jurisdiction. The Secretary seems to suggest that if a court of appeals upholds its jurisdiction in a case such as this one, as a matter of discretionary policy that decision should not be reviewed by this Court because subsequent proceedings may obviate the need for action by this Court. (*Amicus* Br. at 8-9.) However, conversely, where jurisdiction in such cases is rejected, and the petition for review is dismissed, then at least in some past cases the government has actively sought certiorari. See, *e.g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980); *cf. Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193 (1980).[5] If the suggested distinction were followed

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[3] Beyond question, this Court has jurisdiction to review interlocutory decisions of courts of appeals. *Land* v. *Dollar*, 330 U.S. 731, 734 & n.2 (1947).

[4] This case thus is more susceptible to interlocutory review than was *Land* v. *Dollar*, *supra*, where "the question of jurisdiction [was] dependent on decision of the merits." 330 U.S. at 735.

[5] In both *PPG Industries* and *Crown Simpson* the fact that petitions for review were dismissed by courts of appeals did not mean that no review could have been had. Under the decisions of the courts of appeals, reversed by this Court, review was to take place initially in federal district courts.

consistently, the net result would be a significant bias in favor of expanded jurisdiction. Dismissals of cases by courts of appeals on jurisdictional grounds could be reviewed by this Court, but decisions upholding jurisdiction would be rejected out of hand and thereafter would not likely become candidates for review in this Court on jurisdictional grounds.[6] The resulting bias toward expanding jurisdiction could produce an inadvertent and entirely unwarranted increase in the workload and role of the courts of appeals. This Court could avoid such a bias by equating for purposes of its review cases such as the present one where a court of appeals upheld jurisdiction, with cases such as *Harrison* v. *PPG Industries, Inc.*, *supra*, where a court of appeals dismissed a petition for review on jurisdictional grounds. In any event, in both types of instances, the relative maturity or ripeness of the jurisdictional issues is the same.[7]

2. A private prosecutor?

OCAW in this case is not seeking to redress private rights. Instead it is attempting to stand in the shoes of the Secretary and pursue a governmental enforcement action which the Secretary chose to abandon. In the court of appeals OCAW said it had a two-fold interest in stepping forward: It wanted Cyanamid's fetal protection policy ruled invalid and it wanted a fine imposed. Memorandum Of Petitioners In Opposition To Suggestion Of

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[6] In this particular case, roughly five to ten years probably would pass before the case again could be considered by this Court. To preserve the jurisdictional issue, one would have to assume a remand on the merits by the court of appeals to the Commission, a remand from the Commission to an administrative law judge, and then further successive reviews by the Commission and by the court of appeals.

[7] Correspondingly, a grant of review in this case would not represent a departure from the Court's usual practice of declining to review interlocutory orders of courts of appeals. This case is unusual and deserving of review. *See* R .Stern & E. Gressman, *Supreme Court Practice*, § 4.19, at 301-302 (5th ed. 1978).

Lack Of Case Or Controversy, at 12 n.18.[8] Contrary to the decision of the D.C. Circuit, however, nothing in the Act allows OCAW to exercise a prosecutorial function.

The Secretary says "no other court has considered the *precise* question presented here" (*Amicus* Br. at 11 (emphasis added)), and thus there is no conflict in decisions among the circuits justifying review by this Court. Cyanamid agrees that the "precise" question has not been decided by any other court of appeals. Nonetheless, in four reported decisions by the Third, Sixth, and Seventh Circuits, very closely comparable questions have been resolved in a way which analytically is diametrically opposed to the D.C. Circuit's ruling in this case.[9] This disparity is perhaps most graphically illustrated by the fact that the heart of the D.C. Circuit's decision is taken virtually word-for-word from the dissenting opinion in a Third Circuit case. *Compare Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176, 1188-1191 (3d Cir.)

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[8] OCAW's interest in challenging Cyanamid's policy could be, and is being, vindicated by other means. In *Christman, et al.* v. *American Cyanamid Co.*, Civ. Action No. 80-0024-P (N.D.W.Va., filed January 28, 1980), OCAW was joined by several private individuals as plaintiffs in an action based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, seeking monetary relief and an injunction against implementation of Cyanamid's policy or any similar policy.

Regarding imposition of a fine, OCAW informed the court of appeals that it had the following interest:

> [I]f the citation is upheld the Company will be subject to a fine. See 29 U.S.C. § 666. OCAW's members have an obvious interest in seeing that erroneous OSHRC decisions do not enable their employer to evade a fine that should be imposed for violation of the Act. Fines are, after all, an integral part of the prophylatic mechanisms of the Act, designed for the protection of employees.

(Memorandum of Petitioners in Opposition, *supra*, at 12 n.18.)

[9] *Marshall* v. *OCAW & OSHRC*, 647 F.2d 383 (3d Cir. 1981); *Marshall* v. *OSHRC & OCAW*, 635 F.2d 544 (6th Cir. 1980); *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980); *UAW* v. *OSHRC*, 557 F.2d 607 (7th Cir. 1977).

(Pollak, J., concurring and dissenting), *cert. denied*, 449 U.S. 1061 (1980), *with* 671 F.2d at 646-648, 649 n.6, Pet. App. A at 6a-9a, 11a n.6.

The Secretary also observed that "the situation involved here does not arise frequently." (*Amicus* Br. at 11.) If only past litigation is considered, Cyanamid would agree with this observation. In fact, we are not aware of any other prior case where a union sought to pursue prosecution of a citation that the Secretary had decided to abandon. Given the precedent supplied by the D.C. Circuit in this case, however, future such actions may be expected. Thus, rather than suggesting that certiorari should be denied, this point actually demonstrates the significance of the case and the appropriateness of review by this Court.[10]

3. OSHRC's role.

As the Secretary notes, Cyanamid prevailed in the court of appeals on the issue of whether the Commission is a proper party in an action in a court of appeals to review one of its decisions. (*Amicus* Br. at 11-12.) Given

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[10] The importance of the case is also shown by the extra-statutory character of the D.C. Circuit's decision. The court of appeals found on the basis of implication that a union had a right to pursue citations abandoned by the Secretary, but it then had to invent and impose two conditions on that right:

> First, the union must give the Secretary notice of its intention to appeal and must serve him with copies of all the pleadings. This notice requirement is ordered so that the Secretary is made aware of the litigation and so that he may act to intervene if he deems it appropriate. Second, the case may become moot in those instances when the Secretary, participating in the appeal as an amicus curiae or as an intervenor, provides this court with a clear and unconditional statement that he will not prosecute the claim regardless of the disposition of the appeal by this court. The prosecutorial discretion with which the Secretary is vested empowers him not to renew his prosecution effort even if this court were to find that the citation dismissed by the OSHRC asserted a violation under the Act.

(671 F.2d at 650-651, Pet. App. A at 14a.)

this circumstance, Cyanamid ordinarily would give utterly no consideration to seeking review of such an issue in this Court. However, as the Secretary also notes, in this case the issue of whether OSHRC is a proper party is a necessary predicate to raising a further issue. (*Amicus* Br. at 12 n.9.) Unless one accepts the proposition that OSHRC is not a proper party, Cyanamid cannot raise the question whether OCAW's failure to name in timely fashion any proper party as a respondent in the court of appeals precludes that court from acquiring jurisdiction to review OSHRC's decision. This unusual situation simply is not addressed in the standard works on the customs and practices of this Court, including R. Stern & E. Gressman, *Supreme Court Practice* § 6.17 (5th ed. 1978). Under 28 U.S.C. § 1254(1), however, this Court does have jurisdiction to entertain a question thus presented, so long as the requirements in Article III of the Constitution are met.

A "case or controversy" does exist regarding the issue of OSHRC's role. While OCAW currently professes to be "indifferent as to whether the Commission has party status" (OCAW Br. in Opp. at 7), its professed indifference depends entirely upon the outcome of the interrelated further issue of whether it could amend its petition for review to name a proper party respondent, after the jurisdictional time limit for filing a petition had passed.[11]

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[11] Before the decision of the court of appeals allowed the belated amendment, OCAW argued in the alternative that its original petition satisfied applicable jurisdictional requirements. Among other things, OCAW argued that "the fact that the Review Commission is the sole respondent named in the petition does not negate the case or controversy posed by this case." Memorandum Of Petitioners In Opposition To Suggestion Of Lack Of Case Or Controversy, at 12 (capitalization omitted).

4. Improper reliance on the relation-back doctrine.

The Secretary concedes that the timely filing of a petition for review in the court of appeals was a jurisdictional requirement. (*Amicus* Br. at 14.) The only petition for review filed by OCAW in the court of appeals within the allotted time named OSHRC as the sole respondent. The Secretary suggests that designation of a proper respondent in a petition for review is not a jurisdictional necessity, arguing that the relation-back doctrine embodied in Fed. R. Civ. P. 15(c) should be applied by analogy. (*Amicus* Br. at 14-15.) However, there is no basis for reading into the pertinent jurisdictional provisions a relation-back doctrine which is so broad as to reach the facts of this case.[12]

The relation-back provisions of Fed. R. Civ. P. 15(c) can be traced back to two decisions by this Court, *Davis* v. *L. L. Cohen & Co.*, 268 U.S. 638 (1925); and *Mellon* v. *Arkansas Land & Lumber Co.*, 275 U.S. 460 (1928). Those decisions held that substitution of a proper defendant for an improper defendant in a lawsuit was "the commencement of a new and independent proceeding",[13] and thus had to satisfy applicable time limitations on the bringing of the action. The results in these cases were criticized, especially where plaintiffs attempted to sue officers or agencies of the United States but mistakenly named the wrong officer or agency. See Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 Harv. L. Rev. 40 (1963). In response to this criticism,

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[12] The Secretary mistakenly states that Cyanamid does not contest the ruling of the court of appeals that the requirements for a relation-back amendment had been satisfied. (*Amicus* Br. at 15.) Perhaps this confusion arises because the requirements the court of appeals derived by analogy are somewhat uncertain in this context, as the following discussion shows.

[13] *Mellon* v. *Arkansas Land & Lumber Co.*, *supra*, 275 U.S. at 463; *Davis* v. *L. L. Cohen & Co.*, *supra*, 268 U.S. at 642.

Fed. R. Civ. P. 15 was amended in 1966 to add the relation-back provisions of Rule 15(c). This is not a case merely of a misnamed federal agency or official, however. Indeed, the facts do not fall within the relation-back doctrine embodied in Rule 15(c), even if that doctrine can be read by analogy into Fed. R. App. P. 15(a), 20, and 26(b).

OCAW is not an untutored litigant in occupational safety and health matters. Indeed, OCAW or one of its local unions was involved in three of the four prior cases concerning a union's role in enforcement proceedings before the Commission. Moreover, in *Local 8-901, Oil, Chemical and Atomic Workers* v. *OSHRC, etc.*, No. 79-1828 (3d Cir.), the companion case to *Marshall* v. *Sun Petroleum Products Co., supra*, the petition for review filed by an OCAW local union named as respondents both the pertinent employer (Sun Petroleum Products Co.) and the Secretary of Labor.[14] However, in the present case for some reason OCAW chose not to name Cyanamid.[15] Moreover, in this case OCAW did not move to substitute Cyanamid for OSHRC until *after* Cyanamid had filed both a conditional motion for leave to intervene and a suggestion that the petition be dismissed on jurisdictional grounds, among other things for failure to name a proper party respondent. In short, contrary to the ruling of the court of appeals, this was not a case where Cyanamid "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Fed. R. Civ. P. 15(c)(2).

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[14] In *Sun Petroleum* the OCAW local was represented by the same counsel who have represented OCAW here.

[15] Cyanamid was served with a copy of OCAW's petition within the applicable 60-day limitation period and thus did have notice of the action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 21, 1982

Appendix

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No. 81-1784

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

AMERICAN CYANAMID COMPANY,
Petitioner,
v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and LOCAL 3-499, OIL, CHEMICAL and ATOMIC WORKERS,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

APPENDIX A — Page

Oil, Chemical and Atomic Workers International Union, and Local 3-499, Oil, Chemical and Atomic Workers v. Occupational Safety and Health Review Commission, No. 81-1687 (D.C. Cir., February 26, 1982) 1a

APPENDIX B

Secretary of Labor v. American Cyanamid Company, OSHRC Docket No. 79-5762 (OSHRC, April 27, 1981) 21a

APPENDIX C

Secretary of Labor v. American Cyanamid Company, OSHRC Docket No. 79-5762 (ALJ, July 15, 1980) 52a

APPENDIX D

Oil, Chemical and Atomic Workers International Union, and Local 3-499, Oil, Chemical and Atomic Workers v. Occupational Safety and Health Review Commission, No. 81-1687 (D.C. Cir., February 26, 1982) (judgment) 63a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1687

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and LOCAL 3-499, OIL, CHEMICAL and ATOMIC WORKERS,
Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondent

On Motions of the American Cyanamid Company to Intervene and to Dismiss the Petition for Review and of Petitioners to Amend and Reform Caption

---

Argued December 3, 1981

Decided February 26, 1982

George H. Cohen for petitioners.

Charles F. Lettow for American Cyanamid Company, movant for leave to intervene.

Dennis K. Kade, Associate Counsel for Appellate Litigation, Department of Labor, for *amicus curiae* Secretary of Labor.

Before: WALD, MIKVA, and EDWARDS, *Circuit Judges.*

Opinion *Per Curiam.*

PER CURIAM: Petitioner Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW") seek review of a decision of the Occupational Safety and Health Review Commission ("OSHRC" or "Commission") dismissing a citation issued by the Secretary of Labor to the American Cyanamid Company. *Secretary of Labor v. American Cyanamid Company*, OSHRC Docket No. 79-5762 (April 27, 1981), reported at 9 BNA OSHC 1596. American Cyanamid has moved to intervene and has moved to dismiss OCAW's petition for review, arguing that OCAW is not a proper petitioner for review under the Occupational Safety and Health Act of 1970 ("Act"), and that OSHRC is not a proper respondent. 29 U.S.C. § 660(a).

American Cyanamid's motion raises several threshold issues that must be answered before we reach the merits of the petition. Those issues are:

(1) Does the role of the Secretary as the exclusive prosecutor under the Act preclude the appeal of an OSHRC decision by OCAW, a labor union representing affected employees, when the union has participated as a party in the OSHRC proceeding?

(2) Does OCAW have the right to challenge a determination by the Secretary not to appeal a decision by the OSHRC dismissing a citation?

(3) May the OSHRC participate as an active party in the Court of Appeals on a petition for review of its decision?

(4) Is the company the proper party respondent in proceedings initiated by a petition filed by OCAW to review the OSHRC decision?

(5) Is the Secretary the proper party respondent in proceedings initiated by a petition filed by the company to review the OSHRC decisions?

We answer the first, second and third questions in the negative and the fourth and fifth questions in the affirmative. Accordingly, we sustain the OCAW's petition for review and we deny the company's motion to dismiss.

I. Background

The facts giving rise to this litigation are not in dispute. In 1977, American Cyanamid adopted a Fetus Protection Policy and implemented it at its Willow Island, West Virginia plant. This policy precluded female employees of presumed childbearing capacity from being assigned to, bidding into, or holding any production job at that plant which involved occupational exposure to toxic substances identified as harmful to the fetus. Any female production worker who failed to provide evidence of permanent infertility by April, 1978, would have to request a transfer to one of three departments where toxic substances were not used. Only seven job openings were available to the thirty women affected by this policy. To rebut the policy's presumption of the potential childbearing capacity of menstruating women, five female production workers underwent voluntary sterilizations. These women retained their production positions. All five stated that they would not have undergone the procedure but for the company's policy which threatened their livelihood. Late in 1978, two women of presumed childbearing capacity who refused to be sterilized were transferred to the utility pool with subsequent loss of pay and benefits.

OCAW filed a complaint about the policy with the Occupational Safety and Health Administration ("OSHA"), pursuant to 29 U.S.C. § 657(f)(1), in December, 1978. Thereafter, OSHA inspectors conducted an inspection of the Willow Island plant. As a result of this inspection, OSHA issued a citation on October 9, 1979, alleging that Cyanamid had committed a willful violation of the general duty clause, 29 U.S.C. § 654(a)(1), by implementing a policy which required women employees to be sterilized in

order to be eligible to work in certain areas of the plant. Cyanamid filed a timely notice of contest, and the Secretary issued a formal complaint. On November 16, 1979, OCAW elected party status pursuant to Commission Rule 20(a), 29 C.F.R. § 2200.20, in order to participate in hearings concerning this citation before the OSHRC. Cyanamid filed its answer to the Secretary's complaint and moved for summary judgment. The Administrative Law Judge granted the company's motion and dismissed the citation on two independent grounds: (1) that the citation was barred by the Act's six-month statute of limitations; and (2) that the action of the Equal Employment Opportunity Commission precluded the Secretary's jurisdiction over the alleged hazard.

Both the union and the Secretary petitioned the full OSHRC for discretionary review of the judge's decision pursuant to section 12(j) of the Act, 29 U.S.C. § 661(1). After review was directed, the OSHRC affirmed the ruling on a third ground, finding that the citation did not allege the existence of a "hazard" within the meaning of the Act's general duty clause. Accordingly, the citation was vacated.

Pursuant to section 11 of the Act, 29 U.S.C. § 660(a), OCAW filed a timely petition for review. It named the OSHRC as a respondent. The Secretary elected not to file a petition.

II. The Right of OCAW To Appeal

As an initial matter, American Cyanamid challenges the jurisdiction of this court, arguing that OCAW's petition for review fails to present a case or controversy because the statute precludes the union from being heard on matters other than the reasonableness of the abatement period. Our jurisdictional basis for reviewing any OSHRC proceeding is 29 U.S.C. § 660, which provides for appellate review of commission decisions. It states:

> Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 [29 U.S.C. § 659(c)] may obtain a review of such order in . . . the court of appeals for the District of Columbia Circuit . . . .

Cyanamid argues in its motion that the broad language of § 660(a) must be limited by Section 10(c) of the Act, 29 U.S.C. § 659(c). Section 10(c) is the cornerstone of the right of employees, or their authorized representatives, to participate in hearings before the OSHRC. It provides, in its entirety:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 658 (a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with Section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules

> of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

29 U.S.C. § 659(c).

The company contends that section 10(c) limits employee participation in enforcement proceedings to contesting the reasonableness of the abatement period. It reasons that this limit on the initiation of and participation in commission adjudications should be carried over to the instigation of judicial review because Congress intended that the provisions be read together as part of a "detailed statutory scheme." *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10 (1980). That scheme—says the company—may most consistently be interpreted to limit the rights of employees to initiate and participate in proceedings before the commission and to appeal commission decisions to issues challenging the reasonableness of the abatement period.[1]

We reject the company's initial contention that employees have no right to be heard on matters other than the reasonableness of the abatement period. The starting point for our analysis is section 10(c) of the Act, 29 U.S.C. § 659(c). It is apparent that the first sentence of section 10(c) contemplates two types of hearings. The first is triggered by an employer who notifies the Secretary of an intention to contest a citation. In that hearing, employees are authorized to "participate as parties" by virtue of the last sentence of section 10(c). The second

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[1] The position derives the bulk of its support from a recent decision of the Third Circuit, Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1186 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980). In that decision, the court sharply limited the scope of the employees or their union's party status in a proceeding initiated by the employer to the challenge of the length of the abatement period. It found that "any challenge advanced by an employee is limited to an attack on the reasonableness of the abatement period."

type of hearing is triggered by employees who notify the Secretary of their contention "that the period of time fixed in the abatement citation is unreasonable."

This second type of hearing—that initiated by *employees*—is tied to the agenda set by statute: contesting the reasonableness of the abatement period. *Marshall v. OSHRC and OCAW*, 635 F.2d 544, 552 (6th Cir. 1980). Employees are prohibited from instituting a commission action on any matter other than the reasonableness of the abatement period. *UAW v. OSHRC*, 557 F.2d 607, 610 (7th Cir. 1977). Nothing in the text of the statute, however, so confines employee/union participation as "parties" in the first type of hearing—that initiated by the *employer* to contest a citation.

Indeed, the section 10(c) limitation suggested by the company would be an anomaly when viewed in the total context of the Act. Typically, as demonstrated by the instant case, an employee who believes a violation exists that threatens physical harm may request an inspection by giving the Secretary written notice. 29 U.S.C. § 657 (f)(1). If, upon receipt of such notification, the Secretary determines there are reasonable grounds to believe a violation exists, he must conduct a special inspection as soon as possible.[2] *Id.* A representative authorized by the employees shall be given the opportunity to accompany the Secretary or his representative during the physical inspection of the workplace. *Id.* § 657(e). If the Secretary believes that the employer has violated any portion of the Act, "he shall with reasonable promptness issue a citation to the employer." *Id.* § 658.[3] The employer may

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[2] If the Secretary finds no reasonable grounds for an inspection, he must notify the employees in writing. 29 U.S.C. § 657(f)(1).

[3] If, upon inspection, the Secretary determines no violation exists, he must provide for the informal review of his decision and he must furnish to the employees who requested review a written statement of his reason for the disposition of the case. *Id.* § 657(f)(2).

then contest the citation if he disputes the Secretary's finding of a violation flowing from an investigation initiated by employees. At the hearing initiated by the employer, the employee may elect party status. *Id.* § 659 (c). It is at this juncture that the company insists that the election of party status limits the employees to contesting the length of the abatement period. We find no support for this position in the statute. Moreover, we find the adoption of the company's premise inconsistent with the remainder of the statutory scheme. The company would have us hold that the employee's interest in and contribution to the enforcement process, protected by the statute throughout the enforcement process, abruptly ceases once the adjudicative process is initiated by the employer filing a notice of contest. By permitting employees to elect party status, and not qualifying this status with the same limits imposed on the employees' initiation of commission proceedings, it is apparent that Congress intended to continue the broad scope of employee participation in the enforcement of the Act through the adjudicative stages.

The anomalous limitation on employee participation argued by the company is not to be found in the text of section 10(c). The company, however, contends that it is supplied in the report of the Senate Committee on Labor and Public Welfare, which discusses the right of an employee to challenge the reasonableness of the abatement period. Subcom. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 154-55 (Comm. Print 1971) [hereinafter cited as Legislative History]. The company points to the following quotation in the second paragraph in that report to argue that the abatement period is the sole issue that can be raised by employees. We find, however, that when that paragraph is read along with the preceding one, it demonstrates that employee initiation of commission pro-

ceedings is but one of two means of employee participation in OSHRC proceedings.

> If the employer decides to contest a citation or notification, or proposed assessment of penalty, the Secretary must afford an opportunity for a formal hearing under the Administrative Procedure Act. Based upon the hearing record the Secretary shall issue an order confirming, denying, or modifying the citation, notification, or proposed penalty assessment. The procedural rules prescribed by the Secretary for the conduct of such hearings must make provision for affected employees or other representatives to *participate as parties.*
>
> Section 10(c) also gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground. Such challenges must be filed within 15 days of the issuance of the citation and an opportunity for a hearing must be provided in similar fashion to hearings when an employer contests. The employer is to be given an opportunity to participate as a party.

Id. (Emphasis added).

In sum, the legislative history shows that Congress intended to allow employees to participate as parties in enforcement proceedings in two separate contexts—to initiate contests over the reasonableness of the abatement period and to participate as parties in an employer-initiated contest. We find that Congress did not intend to limit the interest assertable by the union in an employer-initiated proceeding to the length of the abatement period. The scheme of the Act enables employees to translate their concern for workplace safety into a demand for an inspection of the workplace, and, if a violation exists, into a citation. If the employer disputes the inspec-

tor's findings and files a notice of contest, the Act entitles employees to "participate as parties" in hearings before the OSHRC. The employees' request for party status confers jurisdiction on the commission to entertain the employees' objections on all matters relating to the citation in question.[4]

We therefore hold that where a union or employee has elected party status in proceedings before the OSHRC, the union or employee has a right to appeal the decision of the OSHRC. As a party in an employer-initiated hearing before the OSHRC, the union will be "adversely affected or aggrieved" by an unfavorable OSHRC decision. Accordingly, the union can seek judicial review in a federal court of appeals under section 11(a) of the Act, 29 U.S.C. § 660(a).

The legislative history of section 11(a) provides further support for our decision. The House version of the Act, H.R. 19200, clearly limited the right to seek judicial review to employers and the Secretary. Legislative History, 1192. The Senate version, S. 2193, contained the identical language as Section 11(a) of the Act, and provided for judicial review of any commission order by any person "adversely affected or aggrieved." *Id.* at 1192. Faced with the conflict between the two provisions for judicial review of commission decisions, the Conference Committee adopted the broader language of "any person

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[4] At least one other court has endorsed this interpretation. In Marshall v. OSHRC and OCAW, 635 F.2d 544, 552 (6th Cir. 1980), the Sixth Circuit agreed with the position taken by Secretary of Labor and construed the Act "as permitting employees having elected party status to participate in prehearing discovery and present their own witnesses."

Pursuant to the statutory mandate of 29 U.S.C. § 659(c), the commission has consistently held that "[an] employee representative electing party status has the right to litigate all the issues raised by the citation and complaint." Southwestern Bell Telephone Co., 5 BNA OSHC 1851, 1852 (1977). *See also* Gurney Industries, Inc., 1 BNA OSHC 1218 (1973).

adversely affected or aggrieved."[5] *Id.* We therefore conclude that an employee can seek judicial review of OSHRC action in two situations: when the employee seeks to challenge a decision from an OSHRC proceeding which he initiated to contest the reasonableness of the abatement period, and when the employee seeks to challenge a decision from an OSHRC proceeding in which he elected party status pursuant to Commission Rule § 2200.20.[6]

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[5] The House bill made no provision for employee participation before the commission, even with respect to abatement dates. This void explains the House limit of judicial review to employers and the Secretary. Legislative History at 1191-92. In conference, the House conferees acceded to the Senate version which granted employees the right to initiate contest with respect to abatement dates and to participate as parties in employer-initiated contests. *Id.*

[6] Our holding, which concerns the rights of employees under the OSHA scheme, comports with procedures adopted by Congress for the settlement of cases in other agencies. An example is the process implemented by the National Labor Relations Board. The General Counsel of the Labor Board decides whether or not to prosecute an unfair labor practice complaint. In most instances, the party that filed the complaint—the charging party—cannot compel the General Counsel to prosecute the complaint nor can the private party prosecute before the Board. In Vaca v. Sipes, 386 U.S. 171, 182 (1967), the Supreme Court held that "the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint" and that private parties cannot institute such proceedings. Under Labor Board rules, once the General Counsel has issued a complaint, the charging party in the case is "accorded formal recognition: he participates in the hearings as a 'party'; he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner. . . ." International Auto Workers Union v. Scofield, 382 U.S. 205, 219 (1965). *See also* ILGWU v. NLRB, 501 F.2d 823 (D.C. Cir. 1974); NLRB v. OCAW, 476 F.2d 1031 (1st Cir. 1973); Concrete Materials of Georgia v. NLRB, 440 F.2d 61 (5th Cir. 1971); NLRB v. Electrical Workers Local 357, 445 F.2d 1015 (9th Cir. 1971); Marine Engineers Beneficial Assn. v. NLRB, 202 F.2d 546 (3d Cir.), *cert. denied*, 246 U.S. 819 (1953). The charging party's inability to initiate a complaint before the Board does not bar the party from obtaining judicial review of an adverse Board ruling. In International Auto Workers, 382 U.S. at 219, the Supreme Court held that "if the Board

Our view does not impinge on the Secretary's unique role in administering the Act. As the Supreme Court has noted, the Act creates public rights that are to be vindicated by the Secretary through government management and enforcement of a complex administrative scheme. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 444-47 (1977). We recognize that the Secretary has been vested with considerable discretion in the promulgation of standards. Thus, employees may not compel the Secretary to adopt a standard. *National Congress of Hispanic American Citizens v. Usery*, 554 F.2d 1196 (D.C. Cir. 1977). Similarly, we are persuaded that enforcement of the Act is the sole responsibility of the Secretary. He is the exclusive prosecutor of OSHA violations. *Atlas Roofing Co.*, 430 U.S. at 445-47; *Dale M. Madden Construction, Inc. v. Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). Necessarily included within the prosecutorial power is the discretion to withdraw or settle a citation issued to an employer, and to compromise, mitigate or settle any penalty assessed under the Act, 29 U.S.C. § 655(e).[7] Thus, employees may not contest the representation of a settlement agreement that abatement has occurred. *Marshall v. OCAW and OSHRC*, 647 F.2d 383, 388 (3d Cir. 1981). They may not prosecute a citation before the commission after the Secretary has moved to withdraw it. *Marshall v. OSHRC and OCAW, supra*, 635 F.2d at 552. They may not argue that a particular method of abatement would

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determines that a complaint should be dismissed, the charging party has a statutory right to judicial review "as a person aggrieved."

[7] The Secretary's prosecutorial discretion to settle cases over employee objections flows from section 10(a) of the Act, 29 U.S.C. § 659(a). If an employer does not timely contest a citation, it becomes an enforceable order "not subject to review by any court or agency" including the commission. *Id.* As a part of settlement of a contested citation, an employer withdraws its notice of contest thus ousting the commission of jurisdiction. In either case, employees are only empowered to invoke commission jurisdiction to object to the reasonableness of the abatement period.

be inefficacious. *Marshall v. Sun Petroleum Co.*, 622 F.2d 1176, 1184-86 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980). They may not challenge the substantive provision of an abatement plan. *UAW v. OSHRC*, *supra*, 557 F.2d at 610-11.

We endorse so broad a reading of prosecutorial discretion under the statute because we believe that such discretion comports with the Congressional intent that the Secretary be charged with the basic responsibilities for administering the Act. We agree with other courts that have considered the issue that the union has no right to challenge the refusal of the Secretary to proceed with a citation or to file a complaint. *See, e.g., Marshall v. OSHRC and OCAW*, *supra*, 635 F.2d at 550. The company, however, contends that these decisions prohibit employees from challenging the Secretary's prosecutorial decisions before the commission proceedings, except where the length of an abatement period is concerned. It reasons that the decision to seek review of a commission decision is a similar exercise of prosecutorial discretion and concludes that allowing employees to petition for judicial review of a commission decision impermissibly usurps the Secretary's prosecutorial discretion as enforcer of the Act.

We reject this position. We agree with the company that a decision of the Secretary not to appeal the OSHRC ruling is an exercise of prosecutorial discretion. Accordingly, we find that the union has no right to challenge the determination of the Secretary not to appeal. In this instance, however, the OCAW is not seeking review of the Secretary's decision; instead, it is seeking judicial review of an order of the OSHRC, an independent adjudicatory body.[8] Under the Act, we hold that a union has the

[8] The employee's right to appeal an adverse decision of an adjudicatory agency has never been interpreted as a review of the prosecutor's decision not to appeal. In many instances, appeals by private parties from the dismissal of an administrative action have gone

right to appeal the ruling of the OSHRC, whether or not the Secretary simultaneously seeks review, as a person "adversely affected or aggrieved" within the meaning of section 11(a) of the Act.

The union's right to appeal OSHRC decisions where it has participated as a party in the commission proceedings is, however, subject to two conditions, derived from the general statutory scheme and purpose of the Act. First, the union must give the Secretary notice of its intention to appeal and must serve him with copies of all of the pleadings. This notice requirement is ordered so that the Secretary is made aware of the litigation and so that he may act to intervene if he deems it appropriate. Second, the case may become moot in those instances when the Secretary, participating in the appeal as an amicus curiae or as an intervenor, provides this court with a clear and unconditional statement that he will not prosecute the claim regardless of the disposition of the appeal by this court. The prosecutorial discretion with which the Secretary is vested empowers him not to renew his prosecution effort even if this court were to find that the citation dismissed by the OSHRC asserted a violation under the Act. *Marshall v. OSHRC and OCAW*, *supra*, 635 F.2d at 549-52. While we will not require the Secretary to furnish us with a statement of his intent, we may dismiss the appeal as moot in instances where the Secretary has voluntarily proffered such a statement after the union has filed a petition for review.[9]

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forward without the filing of an appeal by the prosecutorial agency. *See, e.g.*, Newspaper Drivers v. Detroit Newspaper Publishers Assn., 382 U.S. 374 (1966). The power to seek judicial review of a decision of an adjudicatory agency has never been vested solely in the prosecutorial arm of that agency.

[9] In instances where the Secretary has not furnished the court with a statement of his intent, we will review the decision of the commission. The fact that there is uncertainty as to whether the government will continue to prosecute the case upon remand does not mean that no justiciable controversy exists. *See* Dunlop v. Bachowski, 421 U.S. 560, 575 (1975).

III. The Proper Respondent in the Appeal

We must next decide if the OSHRC, the named respondent in this petition for review, has the authority to participate as a party in this court in a proceeding to review one of its decisions. American Cyanamid, in its motion to dismiss, contends that no case or controversy exists because the OSHRC cannot participate as a party. While we agree with the company that the Act limits the role of the OSHRC to that of an adjudicatory agency and precludes the OSHRC from independent representation in judicial proceedings before this court, we decline to dismiss these proceedings. We grant the motion to remove the OSHRC from these proceedings; concurrently, we grant the OCAW's motion to amend and reform the caption and to name the company as the proper party respondent in this petition for review.

The circuits are sharply divided on the question of whether the commission is a proper party to an OSHA appeal. Three circuits have held that the commission is not a proper party.[10] Two circuits have stated this position in dictum. The Second Circuit has noted that the commission is assigned the "relatively limited role of administrative adjudication." *General Electric Company v. OSHRC*, 583 F.2d 61, 63 n.3 (2d Cir. 1978). In *Brennan v. OSHRC*, 505 F.2d 869, 871 (10th Cir. 1974), the Tenth Circuit found that the commission is "an adjudictory body with no regulatory powers."

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[10] Marshall v. OSHA and OCAW, *supra* (6th Cir. 1980); Marshall v. Sun Petroleum, *supra* (3d Cir. 1980); Dale Madden Construction, Inc. v. Hodgson, 502 F.2d 278 (9th Cir. 1974). For example, in Dunlop v. Don D. Cooney, Inc., 3 BNA OSHC 1109 (9th Cir. 1975), the Ninth Circuit expressly held that the OSHRC is "not a proper party in response "and ordered the commission's brief to be marked "amicus". *See also* Moran, *Parties to Proceeding in the Court of Appeals Under the Occupational Safety and Health Act of 1970*, 15 B.C. Indus. & Com. L. Rev. 1089 (1974).

The opposite position has been taken by the Fourth and Fifth Circuits. In *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1267 (4th Cir. 1974), the Fourth Circuit held that "it is appropriate for the commission to appear in the courts of appeals to defend the policies Congress empowered it to adopt in adjudication." In *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 648 n.8 (5th Cir. 1976), the court noted that the commission is "properly a party similar to other administrative agencies in suits by the Secretary or private parties to review its orders."

An examination of the legislative history [11] and the statute persuades us to endorse the position adopted by five other circuits that the commission does not have the authority to participate as a party in proceedings to review one of its decisions.

When read together, the legislative history and the statutory scheme of the Act compel the conclusion that Congress designed the commission as an independent adjudicator. Other statutes which provide for judicial review of commission action, and which have been construed to allow the commission to be named as respondent, are simply not analogous to this Act. Under these statutes, true adversity exists between the claimant of a government benefit and the commission which seeks to withhold it. Thus, when review of commission action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FERC, *see* 16 U.S.C. § 825*l*(b), it is clear that the commission must be named a respondent since it is the party against whom relief is sought: the court could not grant an effective remedy without its presence. Similarly, the NLRB may be called upon as a party to defend its decisions in court, *see* 29 U.S.C. § 160 (f), because adjudication is being sought of its right to

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[11] An extensive examination of the legislative history and the statutory scheme can be found in Marshall v. Sun Petroleum, *supra* 622 F.2d at 1179-1184.

grant and enforce relief on behalf of the prevailing party before it.

In this instance, the OSHRC has no enforcement power comparable to the FCC, FERC or the NLRB. We believe the OSHRC should never be considered a proper statutory respondent under 29 U.S.C. § 660(a). The commission was envisioned by its creators to be similar to a district court. It was established to settle disputes between employers and the Secretary of Labor over citations issued by the Secretary's inspectors. The Commission, like a district court, has no duty or interest in defending its decision on appeal. As a purely adjudicative entity, it has no stake in the outcome of the litigation. Accordingly, the OSHRC may not participate in this court to review the commission decision as a party respondent in proceedings initiated by any party to the commission hearing.[12]

Sufficient adversity exists between the parties at the commission proceeding to ensure a proper case or controversy at the appellate level. When an employer initiates a hearing before the commission to contest the issuance of a citation, the Secretary automatically is a party respondent in the action. 29 U.S.C. § 659(c). He is charged with defending the action of his inspectors in issuing the citation. Employees may intervene as parties in these hearings. *Id.* If the commission rules in favor of the Secretary and affirms the citation, the employer, a party adversely aggrieved by the commission's order, may file a petition for review of that order within sixty days of the issuance of the order. 29 U.S.C. § 660(a). In this instance, the Secretary is the proper party respondent. His interest was adverse to the employer in the commission proceeding below and continues to be so on

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[12] The role of the commission closely parallels the functions of the Benefits Review Board. This court has treated the Board as an independent adjudicator, similar to a district court, and has dismissed it as a respondent. McCord v. Benefits Review Board, 514 F.2d 198 (D.C. Cir. 1975).

appeal. He has an interest in sustaining a commission action with which he agrees.

In those instances where the commission rules in favor of the employer and dismisses the citation, two parties may appeal the commission's order. The Secretary may file a petition for review of the commission's action. 29 U.S.C. § 660(b). He may have an interest in seeking review of a decision of which he disapproves. In this instance, the employer would be the proper respondent. Like an appellee in the appeal of a district court decision, the employer has a concrete stake in having the commission's order affirmed.

In a case such as the instant one, where the union is appealing an adverse decision by the commission, the proper party respondent is the employer.[13] The deletion of the OSHRC does not trigger any jurisdictional problem potentially foreclosing the effective adjudication of the merits of the appeal. The rationale of Federal Rule of Appellate Procedure 15(a) which mandates that each petition for review of an agency order shall name the agency as respondent is inapplicable.

In most cases, a single private party is contesting the action of an agency, and the agency must appear and defend to assure the adversarial stance requisite to a case or controversy. In this case, however, sufficient adversity exists between the union and the company to insure proper litigation without the participation of the OSHRC. The company's interest is adverse to the interests of the petitioner union. It can be expected to litigate vigorously to sustain the ruling of the OSHRC. The union plainly has an interest in having the OSHRC decision reversed and the citation upheld, resulting in an

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[13] We do not decide whether the employer is the only proper respondent in cases such as this one. We express no opinion as to whether the Secretary could participate as a respondent in petitions for review filed by the union. *Cf.* Shahady v. Atlas and Marble Co., et al., No. 81-1818 (D.C. Cir. February 26, 1982).

invalidation of the company's Fetus Protection Policy and a fine assessed against the company. To require the OSHRC to appear as a party would parallel requiring a district court to appear and defend its decision upon direct appeal. Just as a district court may not defend its decision in the court of appeals, the OSHRC has no authority to defend its order before this court.

In this case, the motion to amend and reform the caption to delete the OSHRC and add the company as a respondent was filed thirty-three days after the sixty-day statutory period to file a proper petition for review of the OSHRC decision had expired. We are in agreement with other circuits that courts of appeals have no jurisdiction to grant relief from a final OSHRC order unless a petition for review is filed within the sixty-day period following the date the order becomes final. *Consolidated Andy, Inc. v. Donovan*, 642 F.2d 778, 779 (5th Cir. 1981); *Midway Industrial Contractors, Inc. v. OSHRC*, 616 F.2d 346, 347 (7th Cir. 1980); *Hoerner Waldorf Pan American Bag Co., Inc. v. OSHRC*, 614 F.2d 795, 796 (1st Cir. 1980).

We are not confronted, however, with this problem. In this case, the petition for review was timely filed but the petitioners mistakenly named the OSHRC as the respondent. Discovering its mistake, the union moved to amend its petition to name the company as the proper respondent; by this time, the statutory sixty-day period had expired. We recognize that, in similar circumstances, some courts[14] have held that the petition must be dismissed for failure to file timely. They have construed the motion to amend as one which initiates a new proceeding outside of the sixty-day statutory period. We are unwilling to adopt so draconian an attitude, particularly in

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[14] *See* Cohn v. Federal Security Adm., 199 F. Supp. 884 (W.D.N.Y. 1961); Hall v. HEW, 199 F. Supp. 833 (S.D. Tex. 1960); Cunningham v. United States, 199 F. Supp. 541 (W.D. Mo. 1959).

this instance. The jurisdictional issue raised by the company's motion to dismiss is one of first impression in this circuit. Because of the ambiguity in the statutory language and the split in the circuits over the proper respondent in actions brought to review an OSHRC decision, we decline to penalize the union for its mistake in naming the OSHRC as respondent. To do so would defeat unjustly the union's opportunity to prove its case.

We will consider this motion to amend the caption as one which relates back to the date on which the petition for review was filed.[15] The company was put on notice of the petition for review within the sixty-day period by means of delivery of process. In addition, the company knew that, but for a mistake concerning the identity of the proper respondent, the action would have been brought against it. We accordingly deny the company's motion to dismiss for failure to name a proper respondent and grant the union's motion to amend the caption to dismiss the OSHRC and add the company as a party respondent.

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[15] *See* Jacoby, *The Effect of Recent Changes in the Law of 'Non-statutory' Judicial Review*, 53 GEO. L. J. 19, 42-43 (1965); Byse, *Suing the 'Wrong' Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform*, 77 HARV. L. REV. 40 (1963); FED. R. CIV. P. 15(c) advisory committee note. *See also* Simmons v. HEW, 328 F.2d 86 (3d Cir. 1964); In re National Student Marketing Litigation, 413 F. Supp. 1159 (D.D.C. 1976); Davis Water and Waste Industries v. Jim Wilson, Inc., 67 F.R.D. 509 (E.D. Tenn. 1974); Infotronics Corp. v. Varian Associates Corp., 45 F.R.D. 91 (S.D. Tex. 1968).

APPENDIX B

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 79-5762

SECRETARY OF LABOR,
Complainant,

v.

AMERICAN CYANAMID COMPANY,
Respondent.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND LOCAL 3-499,
Authorized Employee Representative

DECISION

Before BARNAKO, Acting Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This is an appeal by the Secretary of Labor (the "Secretary") from a summary judgment in Respondent's favor.[1] The question for decision is whether an employer policy that excludes women aged 16 to 50, who have not been surgically sterilized, from certain employment constitutes a hazard within the meaning of section 5(a)(1), the "general duty clause," of the Occupational Safety

[1] Administrative Law Judge William E. Brennan granted Respondent's motion for summary judgment. The judge's ruling is before the Commission pursuant to 29 U.S.C. § 661(i).

and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act").[2] We hold that the policy is not a hazard cognizable under section 5(a)(1).

I

In January 1978, Respondent, American Cyanamid Company, announced to employees of its Willow Island, West Virginia, pigments manufacturing plant that it intended to implement what it called the "fetus protection policy." This policy, as ultimately implemented, excluded women aged 16 through 50 from production jobs in the lead pigments department unless they could prove that they had been surgically sterilized. The stated purpose of the policy was to protect the fetuses of women exposed to lead, particularly during early pregnancy when the employee might not know of her pregnancy.[3] Between February and July 1978, five women employed in the lead pigments department submitted to surgical sterilization in a hospital not associated with Respondent. In September 1978, two women who had not been sterilized were transferred out of the lead pigments department. By October 2, 1978, no woman of childbearing capacity was employed in the department.

In response to a complaint filed by the Oil, Chemical and Atomic Workers Union and its Local 8-499 in

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[2] Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5(a) Each employer—
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

[3] The parties stipulated that scientific studies indicate that lead has profoundly adverse effects on the course of reproduction both before and after conception; that fetuses are susceptible at all stages of development, including the first trimester when the mother may not know she is pregnant; and that maternal blood lead levels cannot be reduced instantaneously when pregnancy is discovered.

December 1978, an Occupational Safety and Health Administration ("OSHA") inspection was conducted between January 4 and April 13, 1979. In October 1979, a citation was issued charging Respondent with a willful violation of the general duty clause and proposing a penalty of $10,000. Respondent timely filed a notice of contest. The Secretary's citation and complaint alleged that Respondent failed to

> furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that: the employer adopted and implemented a policy which required women employees to be sterilized in order to be eligible to work in those areas of the plant where they would be exposed to certain toxic substances.

Before Judge Brennan, Respondent moved for summary judgment on three grounds: (1) that the citation was barred by the six-month statute of limitations at section 9(c) of the Act, 29 U.S.C. § 658(c);[4] (2) that OSHA is precluded from exercising authority in this matter under section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1);[5] and (3) OSHA lacks jurisdiction because the conduct alleged was not a violation of the Act. The administrative law judge granted the motion on statute of limitations and section 4(b)(1) grounds. He ruled that the citation was untimely in that it was issued more

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[4] Section 9(c) provides:

> No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

[5] Section 4(b)(1) provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

than six months after five women had been sterilized and two others of childbearing capacity had been transferred out of the lead pigments department. He further concluded that OSHA is barred from exercising authority over the matter because two other federal statutes speak to such conditions of employment: the National Labor Relations Act, 29 U.S.C. §§ 151-168, as a possible unfair labor practice, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), as possible impermissible sex-based discrimination.

Commissioner Cleary granted the Secretary's petition for review and directed expedited review of the timeliness and exemption issues. Acting Chairman Barnako directed the parties to brief two additional issues:

> Assuming that the judge erred in granting Respondent's motion for summary judgment and vacating the citation on the grounds stated by the judge, is vacation of the citation at this stage in the proceedings nevertheless appropriate for the reason stated in Respondent's motion for summary judgment (that the conduct alleged does not constitute a violation of the Occupational Safety and Health Act) and in Respondent's second affirmative defense in its answer (that the citation and complaint fail to allege any injury or risk arising out of the workplace).

Acting Chairman Barnako's first directed issue raises the potentially dispositive question of whether a policy which excludes from certain employment women who have not been surgically sterilized constitutes a hazard within the meaning of the general duty clause.[6]

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[6] The question before us on review is not whether Respondent has committed a violation. Our discussion is limited to the threshold issue of whether the complaint states a cognizable claim under the Act.

II

On review Respondent argues that the fetus protection policy is not a hazard within the meaning of the general duty clause. Respondent takes the position that Congress did not intend the Act to apply to every conceivable aspect of employer-employee relations, and certainly not to voluntarily elected surgical procedures performed outside the workplace by physicians not associated with the employer. Respondent points to language in the Act and in the case law which, it asserts, reflects congressional intent to limit the ambit of the Act to injuries occurring in the workplace.[7]

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[7] Respondent cites several phrases in the Act as evidence of this congressional intent: § 2(a)—"work situations"; § 2(b)—"safe and healthful working conditions"; § 2(b)(1)—"At their places of employment"; § 2(b)(7)—"work experience"; § 3(8)—"occupational safety and health standards" with reference to "employment and places of employment"; § 5(a)(1)—"employment and place of employment." In addition, Respondent contends that § 4(a), "This [Act] shall apply with respect to *employment performed in a workplace*. . ." (emphasis added by Respondent), establishes a jurisdictional prerequisite that the hazard addressed be in a workplace. These sections were also cited by the Secretary as evidence of the Act's broad reach.

Respondent also quotes from a Senate report which states that the Act was aimed at the "problem of assuring safe and healthful *workplaces*." S. Rep. No. 91-1282, 91st Cong. 2d Sess. 1970, *reprinted in* [1970] U.S. Code Cong. & Admin. News 5177, 5178 (emphasis added by Respondent).

Respondent also cites several cases in which the courts discuss the applicability of the Act in terms of workplaces: *Cape & Vineyard Div. of New Bedford Gas v. OSHRC*, 512 F.2d 1148, 1150 (5th Cir. 1975) (the goal of the Act is "to eliminate dangerous conditions in the workplace"); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976), and *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 (D.C. Cir. 1973) (the Secretary must establish that an employer failed to render its workplace free of hazard); *Clary v. Ocean Drilling and Exploration Co.*, 429 F.Supp. 905 (W.D.La. 1977), *aff'd*, 609 F.2d 1120 (5th Cir. 1980) (off-shore mobile drilling units are not workplaces within the meaning of the Act).

The Secretary, on the other hand, contends that any condition of employment which can ultimately result in reduced functional capacity is a hazard within the meaning of the general duty clause. The fetus protection policy is a condition of employment, the Secretary argues, which can lead to reduced functional capacity in that, as a direct result of the policy's implementation, some employees will undergo surgical sterilization in order to protect their jobs. Although the medical procedure itself is performed outside the workplace by health care providers not under the employer's control, the Secretary maintains that the employee's decision to preclude her reproductive capacity is directly related to her work experience. The Secretary cites the personal hygiene standards at 29 C.F.R. §§ 1910.141 and 1910.142,[8] the Medical Removal Protection provision of the new lead standard,[9] and case law holding that employees traveling to and from work may be protected by the Act,[10] as examples of work-related conditions which have been held to fall within the ambit

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[8] 29 C.F.R. § 1910.141 establishes requirements for toilets, washing facilities, showers, eating and and drinking, and personal services. 29 C.F.R. § 1910.142 prescribes safety and sanitation requirements for temporary labor camps.

[9] 29 C.F.R. § 1910.1025(k) provides for the temporary removal of employees with elevated blood lead levels from jobs involving exposure to lead. This provision of the lead standard was specifically upheld in *United Steelworkers of America, AFL-CIO-CLC v. Marshall*, 8 BNA OSHC 1810, 1980 CCH OSHC ¶ 24,717 (D.C. Cir. 1980), *pet. for cert. filed*, No. 80-1134 (Jan. 7, 1981).

The Secretary also relies on the prophylactic chelation prohibition in the new lead standard, 29 C.F.R. § 1910.1025(j)(4)(i), as further evidence that the Act applies to injuries which occur outside the workplace. Prophylactic chelation is a form of drug therapy used to reduce blood lead levels. It can have severe adverse side effects and may actually aggravate the dangers of lead poisoning. 43 Fed. Reg. 53001-53008.

[10] *Sugar Cane Growers Coop. of Florida*, 76 OSAHRC 62/E4, 4 BNA OSHC 1320, 1976-77 CCH OSHD ¶ 20,795 (No. 7673, 1976).

of the Act, even though they occur outside the workplace itself.

The Coalition for the Reproductive Rights of Workers ("CRROW"), the nonparty intervenor,[11] adds that by arguing that the Act does not apply to surgical procedures performed outside the workplace, Respondent mischaracterizes the nature of the alleged violation, "the crux of which is not the surgical procedure itself, but the employer-adopted sterilization policy that led up to it." Citing case law which holds that employees traveling to and from the worksite are protected by the Act[12] and that employer-provided and controlled housing may be covered by the Act,[13] CRROW maintains that the policy was sufficiently interwoven with the employment experience at Respondent's plant to permit enforcement of the Act.

III

In our view, the critical point is not that the physical impact of the policy on employees, reduced functional capacity due to surgical sterilization, was ultimately achieved outside the workplace. We agree with CRROW that it is employer implementation of the policy that is

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[11] The Oil, Chemical, and Atomic Workers International Union and its Local 3-499 elected party status as the authorized employee representative and submitted letters and other documents in support of the Secretary's brief on review. The Center for Law and Social Policy, Coalition for the Reproductive Rights of Workers, was granted intervenor nonparty status and submitted a brief on review which argued substantially in support of the Secretary's brief.

[12] *Sugar Cane Growers Coop. of Florida, supra* note 10.

[13] *C.R. Burnett and Sons, Inc.*, 80 OSAHRC ——, 9 BNA OSHC 1009, 1980 CCH OSHD ¶ 24,964 (No. 78-1103, 1980), *pet. for leave to file out-of-time pet. for review denied*, No. 81-7057 (5th Cir. Feb. 6, 1981), *pet. for rehearing filed* (February 20, 1981). The Commission held that a temporary labor camp bears a sufficient nexus to employment to permit enforcement of the Act because the camp bears a "direct relationship" to employment.

at issue here and to that extent the policy is a condition of employment within the meaning of the Act. However, we believe that Respondent is correct in arguing that Congress did not intend the Act to apply to every conceivable aspect of employer-employee relations and that due to its unique characteristics this condition of employment is not a hazard within the meaning of the general duty clause.[14]

The purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. * * *"[15] To that end the general duty clause requires each employer to furnish employment and a place of employment free of recognized hazards that are causing or are likely to cause death or serious physical harm. The Act does not, however, define the term "hazard." Inasmuch as acts of Congress should be fairly read to effectuate congressional intent,[16] we must turn to the legislative history of the Act for guidance.

Congressional floor debates, committee reports, and individual and minority views reported in the legislative history are replete with discussions of air pollutants, industrial poisons, combustibles and explosives, noise, unsafe work practices and inadequate safety training, and the like.[17] The effects on employees which Congress

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[14] In his citation and complaint the Secretary alleges that the fetus protection policy *requires* sterilization as a condition of employment. Inasmuch as it is impossible for an employer literally to compel employees to undergo sterilization, we believe it is more accurate to describe the policy as one excluding women of childbearing capacity from certain employment.

[15] Section 2(b) of the Act, 29 U.S.C. § 651(b).

[16] *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.05 (Sands ed. 1973); *Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), *cert. denied*, 440 U.S. 980 (1979).

[17] Subcommittee on Labor of the Committee on Labor and Public Welfare of the United States Senate, 92d Cong., 1st Sess., LEGISLA-

hoped to alleviate are described in general terms such as accident, disease, industrial injury, reduced life expectancy, crippling, maiming, disablement and death,[18] and in specific terms such as cancer, allergy, heart disease, respiratory impairment, chemical poisoning, burns, broken bones, and the like.[19] Repeated reference is made to the fact that congressional action with regard to occupational safety and health received its impetus from the vast numbers of on-the-job injuries and deaths reported each year.[20] In the words of Congressman Anderson, "the worker's surroundings and the conditions under which he

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TIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (Comm. Print 171) (hereafter "LEGISLATIVE HISTORY"):

Discussion of air pollutants includes specific references to dust and lint (pp. 319, 343, 415), asbestos (pp. 319, 845, 1002, 1045, 1090), harmful vapors (p. 369), fumes (pp. 415, 456), silica dust (p. 985), and cotton fibers (p. 1002). References to specific industrial poisons include pesticides (pp. 412, 445, 517, 1002), betanaphthylamine (p. 845), lead (p. 985), insecticides (p. 1002), carbon tetrachloride (p. 1081), zinc (p. 1090), and mercury (pp. 985, 1090). Explosions are mentioned at pp. 438 and 459. Discussions of unsafe work practices and inadequate safety training focus on safety devices (pp. 324, 343, 1002), machine guards (p. 346), "unsafe" or "defective" equipment (pp. 455, 1002), "potentially hazardous processes" (p. 431), improper use of pesticides (p. 517), and "using wrong tools," "taking unnecessary chances," and "assuming awkward positions" (p. 1022). The dangers of excessive noise levels are mentioned at pp. 412 and 485.

[18] LEGISLATIVE HISTORY at pp. 320, 323, 324, 326, 411, 412, 518, 523, 983, 1003, 1040, 1045, 1079, 1080, 1084, 1086, 1148.

[19] Falls (p. 412), cancer (pp. 412, 845, 1001), allergies (p. 412), heart disease (p. 412), shortness of breath (p. 412), chronic cough (p. 412), fever (p. 412), convulsions (p. 413), black lung disease (pp. 513, 517, 1002), emphysema (pp. 513, 517, 1002), silicosis (pp. 845, 1045, 1090), paralysis (p. 1002), blindness (p. 1002), byssinosis (pp. 1002, 1045), asbestosis (pp. 1045, 1090), berylliosis (p. 1045), liver and skin disease (p. 1081), zinc, lead and mercury poisoning (p. 1090).

[20] LEGISLATIVE HISTORY at pp. 324, 326, 445, 509, 516-17, 519, 979, 981, 984, 985, 987, 1038.

works are of crucial importance in the whole environmental question for it is in this environment that he spends one-third of his day. The air he breathes and the tools and materials he handles can pose a direct threat to his health, safety, and well-being if adequate precautions are not taken. This is really what we are talking about today in considering the need for national industrial health and safety standards." [21] From this it is clear that Congress conceived of occupational hazards in terms of processes and materials which cause injury or disease by operating directly upon employees as they engage in work or work-related activities.[22]

The fetus protection policy is of a different character altogether. It is neither a work process nor a work material, and it manifestly cannot alter the physical integrity of employees while they are engaged in work or work-related activities. An employee's decision to undergo sterilization in order to gain or retain employment grows out of economic and social factors which operate primarily outside the workplace. The employer neither controls nor creates these factors as he creates or controls work processes and materials. For these reasons we conclude that the policy is not a hazard within the meaning of the general duty clause.

It is true, as the Secretary points out, that the Act is broad in scope and may be fairly described as intended to protect employees from reduced functional capacity as a result of the work experience.[23] However, it does not

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[21] *Id.* at 981.

[22] In the ten years of the Act's existence, the Secretary has not, to our knowledge, cited an employer for a condition or practice that did not operate directly upon employees engaged in work or work-related activities.

[23] To this end we have held that trucks used to transport farm workers to the fields are places of employment within the meaning of the general duty clause, *Sugar Cane Growers Coop. of Florida*, *supra* note 10, and that temporary labor camps are covered by the

follow that the general duty clause applies to an employment policy whose physical impact on employees is indirect and derives not from work processes and materials but from social and economic factors outside the workplace.

Although a statute can operate prospectively so as to include circumstances unknown at the time of enactment, the rule of progressive construction applies only where the language of the statute, as illuminated by legislative history and other extrinsic aids, can be read fairly to include the unforeseen circumstances.[24] Whether an unforeseen circumstance can be read fairly to fall within the ambit of a particular statute depends not only on policy considerations, but on whether that circumstance is "substantially comparable" to those actually contemplated by Congress.[25] This is so because the legislature

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Act when they are owned, controlled and maintained by the employer and are provided to employees for the employer's benefit and convenience. *C.R. Burnett and Sons, Inc., supra* note 13.

[24] *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 49.02 (Sands ed. 1973); *see also Barr v. United States*, 324 U.S. 83 (1945).

[25] *Cf. Investment Annuity, Inc. v. Blumenthal*, 442 F.Supp. 681, 689 (D.D.C. 1977), *rev'd on other grounds*, 609 F.2d 1 (D.D.C. 1979), *cert. denied*, 100 S.Ct. 2961 (1980) (in connection with a provision of the Internal Revenue Code, the District Court stated: "The mere fact that Congress did not consider an as-yet uninvented alternative to a 'statutorily approved' arrangement cannot be said to bar application of the statute to a later-invented alternative *if that alternative is comparable to the 'approved' arrangement in substantially all respects.*" (emphasis added).); *Montana Power Co. v. Fed. Power Comm'n.*, 445 F.2d 739, 746 (D.D. Cir. 1970), *cert. denied*, 400 U.S. 1013 (1971) (in a case involving the readjustment of annual rentals due Indian tribes for use of tribal land by a power company, the Circuit Court stated that when Congress did not expressly address itself to a particular issue, "the court must discern the applicable legislative intent by what is necessarily an act of projection—starting from the areas where the legislative intent is readily discernible, and *projecting to fair and reasonable corollaries* of that intent for the specific issue before us." (emphasis added).).

does not merely enact general policies. "By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." [26]

The definition of hazard proposed by the Secretary is not, under any fair reading of the legislative history, substantially comparable to the concept of hazard entertained by Congress in passing the Occupational Safety and Health Act of 1970. Accordingly, we hold that the citation in this case fails to allege a violation cognizable under the general duty clause of the Act and vacate that citation.[27]

SO ORDERED.

FOR THE COMMISSION

/s/ Ray H. Darling, Jr.
RAY H. DARLING, JR.
Executive Secretary

Dated: Apr. 27, 1981.

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[26] *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 392 (1970).

[27] In light of our disposition of this matter we have no occasion to consider the questions of timeliness and exemption under § 4(b)(1) of the Act.

COTTINE, Commissioner, dissenting:*

The threshold issue before the Commission is whether the judge erred in granting the Respondent's Motion for Summary Judgment on the basis that: (1) the citation is barred by the six-month statute of limitations of section 9(c) of the Act, 29 U.S.C. § 658(c), and (2) the cited working conditions are exempt from the provisions of the Act under section 4(b)(1), 29 U.S.C. § 653(b)(1). The second issue, which is treated as dispositive by the majority, is whether the summary judgment motion nevertheless should be granted on grounds not considered by the judge—that the citation and complaint fail to allege a workplace hazard cognizable under section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), the Act's general duty clause.[1]

A summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment on the existing record as a matter of law. *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Nat'l Screen Service Corp. v. Poster Exchange, Inc.*, 305 F.2d 647 (5th Cir. 1962). Respondent is not entitled to judgment on the grounds stated by the judge and the record in this case raises triable issues of fact regarding the Respondent's alleged noncom-

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* The Respondent's motions for my voluntary recusal and for *voir dire* are denied. A memorandum opinion on these motions is attached as Appendix A.

[1] My colleagues state that they "have no occasion to consider the questions of timeliness and exemption under § 4(b)(1) of the Act" because of their disposition. However, these are the only issues discussed in the judge's report that is before us on discretionary review under 29 U.S.C. § 666(i) and they are the only issues raised in the petitions for review filed by the Secretary and the Authorized Employee Representative that were granted by Commissioner Cleary in the exercise of his statutory discretion. Accordingly, these issues must be resolved.

pliance with the general duty clause of the Occupational Safety and Health Act of 1970. The ruling on the summary judgment motion should be vacated and the case remanded for further proceedings on the merits. Accordingly, I dissent.

I

The citation in this case alleged that the Respondent, American Cyanamid Company, violated section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), by the adoption and implementation of a "Fetus Protection Policy" that required female employees of child-bearing age to be sterilized in order to work in areas of the Respondent's plant where they would be exposed to certain toxic substances. Pursuant to that policy five female production employees were voluntarily sterilized. The last surgical sterilization was performed prior to August, 1978. In December, 1978, the Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW") filed a complaint with the Department of Labor. An inspection of American Cyanamid's worksite by OSHA personnel was conducted between January and April, 1979. The citation in this case alleging a willful violation of the Act was issued on October 9, 1979 and these proceedings were initiated by the employer's notice of contest.[2]

II

A

The administrative law judge ruled that the citation in this case is barred by the six-month statute of limitations at section 9(c) of the Act[3] because the last of the

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[2] A separate citation arising out of the same inspection involving alleged employee exposure to excessive lead levels is docketed separately under OSHRC Docket No. 79-2438 and is currently pending before the Commission.

[3] Section 9(c) of the Act, 29 U.S.C. § 658(c), provides: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

five sterilizations took place approximately 14 months before issuance of the citation and the last woman of child-bearing capacity to be removed from the Lead Pigments Department was transferred out approximately one year before the issuance of the citation. However, it is the policy, not the sterilizations, which is alleged by the Secretary to be violative of the general duty clause. The policy was in effect after the last sterilization was performed and remained in effect after the issuance of the citation. The fact that the five sterilizations occurred more than six months before the issuance of the citation does not bar the citation because actual physical harm is not an element of a general duty clause violation. *See, e.g., Pratt & Whitney Aircraft*, 80 OSAHRC 38/A2, 8 BNA OSHC 1329, 1980 CCH OSHD ¶ 24,447 (No. 13591, 1980), *pet. for review filed*, No. 80-4102 (2d. Cir. June 24, 1980).[4] Furthermore, the citation is not barred by the fact that all women of child-bearing capacity had been transferred out of the Lead Pigments Department more than six months prior to the issuance of the citation. Whether it is reasonably foreseeable that women employed elsewhere in the plant would submit to surgical sterilization in order to transfer *into* the Lead Pigments Department constitutes a genuine issue of material fact under this general duty clause citation. *See Pratt & Whitney Aircraft, supra.* Accordingly, the citation is not barred by 29 U.S.C. § 658(c).

B

The judge also ruled that OSHA has been preempted from exercising jurdisdiction in this matter under section 4(b)(1)[5] of the Act because either the Equal Em-

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[4] These five sterilizations do constitute prima facie evidence that serious harm is likely to occur. *See National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973).

[5] Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal Agencies, and

ployment Opportunity Commission ("EEOC") or the National Labor Relations Board ("NLRB") has exercised authority over the cited practice. The judge did not point to any particular exercise of authority by the NLRB, but did cite the EEOC's Proposed Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, issued February 1, 1980, 45 Fed. Reg. 7514 (1980), as an exercise of authority by that agency over the cited practice.

Under section 4(b)(1) of the Act, OSHA is precluded from exercising authority to regulate the working conditions of employees only if: (1) a sister agency possesses statutory authority to regulate the health and safety of the affected employees, and (2) that agency has actually exercised its authority over the cited working conditions. *Northwest Airlines, Inc.*, 80 OSAHRC ——, 8 BNA OSHC 1982, 1980 CCH OSHD ¶ 24,751 (No. 13649, 1980). In this case, it is not necessary to consider whether the proposed guidelines issued by the EEOC constitute an exercise of authority for purposes of section 4(b)(1), because neither the EEOC nor the NLRB possesses statutory authority to regulate employee safety and health. EEOC has statutory authority to act with respect to discrimination in employment. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Indeed, in its introduction to the proposed guidelines, EEOC itself has specifically disavowed any intent to regulate employee safety and health:

> the proposed guidelines do not attempt to implement or enforce policies related to health and safety. These guidelines affirm the goal of Title VII . . . to assure equality of employment opportunity. The task of assuring a workplace free of conditions that threaten

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State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

> the health or safety of employees remains with the federal agencies specifically granted that responsibility:

43 Fed.Reg. at 7514.[8] The primary concern of the NLRB is the right of employees to engage in concerted activity for the purpose of collective bargaining. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964). The NLRB has no statutory authority to regulate employee safety or health.

Accordingly, the judge's ruling on American Cyanamid's summary judgment motion should be vacated.

III

A

The declared purpose of the Occupational Safety and Health Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." 29 U.S.C. § 651(b)(2). The Act places primary responsibility for occupational safety and health on the employer by requiring each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1), and to "comply with occupational safety and health standards promulgated under this Act," 29 U.S.C. § 654(a)(2).

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[8] Even assuming the statutory authority to affect occupational saftey or health, the interpretive guidelines were a rulemaking proposal and entitled to no substantive legal effect until finally adopted. *See Indiana Harbor Belt Railroad Co.*, 77 OSAHRC 13/A2, 4 BNA OSHC 2006, 1976-77 CCH OSHD ¶ 21,473 (No. 12420, 1977); *Seaboard Coast Line Railroad Co.*, 75 OSAHRC 11/E14, 3 BNA OSHC 1767, 1975-76 CCH OSHD ¶ 20,185 (No. 11904, 1975), *appeal denied*, 548 F.2d 1052 (D.C. Cir. 1976). The proposed guidelines were withdrawn by the EEOC on January 16, 1981. 46 Fed. Reg. 3916.

The Secretary's allegations in this case are directed toward a policy that the majority acknowledges to be a condition of employment. Nevertheless, my colleagues conclude that because the policy has an indirect physical impact on employees, deriving from social and economic factors outside the workplace that the employer neither creates nor controls, it is not cognizable as a workplace hazard under the Act. Corporate policy that offers employees a choice between jobs and surgical sterilization is comparable to a corporate policy that offers employees a choice between jobs and exposure to sterilizing chemicals. To say one choice is prohibited by the Act while the other is not is to repudiate the letter and spirit of the Act.

The Act's general duty clause, 29 U.S.C. § 654(a)(1), was included in the statute to "fill those interstices necessarily remaining after the promulgation of specific safety standards," because "[i]t would be utterly unreasonable to expect the Secretary to promulgate specific safety standards which would protect employees from every conceivable hazardous condition." *Bristol Steel & Iron Works, Inc. v. OSAHRC & Marshall*, 601 F.2d 717, 721 & n. 11 (4th Cir. 1979). The Senate Committee on Labor and Public Welfare explained the purpose of the clause as follows:

> [P]recise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which results in such a misfortune. Therefore, to cover such circumstances the Committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards to the health and safety of their employees.

S. Rep. No. 91-1282, 91st Cong., 2d Sess. 9 (1970), *reprinted in Subcomm. on Labor of the Senate Comm. on*

Labor & Public Welfare, 92d Cong. 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 149 (1971) ("*Legis. Hist.*"). The House Committee on Education and Labor recognized that the absence of a general duty clause "would mean the absence of authority to cope with a hazardous condition . . . for which no standard has been promulgated." H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 21 (1970), *reprinted in Legis. Hist.*, at 851. The House Committee specifically acknowledged that the general duty clause was "to provide for the protection of employees who are working under such *unique* circumstances that no standard has yet been enacted to cover [the] situation." H.R. Rep. No. 91-1291, at 21-22, *reprinted in Legis. Hist.* at 851-52 (emphasis in original).

Incredibly, despite this clear legislative intent, the majority concludes that "due to its *unique* characteristics this condition of employment [the Fetus Protection Policy] is not a hazard within the meaning of the general duty clause." (Emphasis added). This unnecessarily restrictive construction of the general duty clause limits it application and endangers rather than protects the health of American workers. *See American Smelting & Refining Co. v. OSHRC*, 501 F.2d 504, 511 (8th Cir. 1974). My colleagues' narrow view of the reach of the general duty clause is in direct conflict with the remedial purpose of the Act and its legislative history. It is precisely because the legislators deemed it essential that worksites be freed of recognized hazards threatening life or health that the general duty clause was included in the statute. Moreover, in enacting the general duty clause, Congress recognized the impossibility of specifically identifying and regulating all conceivable hazards that existed or would exist. *See* 29 U.S.C. § 655(g).

Though Congress debated occupational hazards primarily in terms of processes and materials that cause injury or disease by operating directly upon employees as

they engage in work or work-related activities,[7] it does not follow that Congress intended to exclude from the ambit of the Act an employment policy that offers employees a choice between work and surgical sterlization. The Act was designed to relieve employees of the choice between their jobs and their safety and health. In concluding that "[a] worker should not have to choose between his job and his life," the Sixth Circuit in *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 725 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980), noted that "[a] right to a hazard free workplace is implicit throughout the act . . . [and is] specifically contained in the Act's statement of purpose." 593 F.2d at 736.

B

In keeping with its broad remedial purpose, the terms of the Act have been construed liberally. In *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 100 S.Ct. 883 (1980), the United States Supreme Court upheld an OSHA regulation that protects employees' right to walk off the job under certain circumstances, despite the absence of express language in the Act to that effect.[8]

> The regulation . . . on its face appears to further the overriding purpose of the Act and rationally to complement its remedial scheme. In the absence of some contrary indication in the legislative history, the Sec-

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[7] The majority states at n. 22 that, to its knowledge, the Secretary has not cited employers previously for conditions or practices that did not operate directly upon employees engaged in work or work related activities. However, the Commission decisions in *C.R. Burnett & Sons, Inc. & Harllee Farms*, 80 OSAHRC ——, 9 BNA OSHC 1009, 1980 CCH OSHD ¶ 24,964 (Nos. 78-1103 & 78-1105, 1980) and *Sugar Cane Growers Cooperative of Florida*, 76 OSAHRC 62/E4, 4 BNA OSHC 1320, 1976-77 CCH OSHD ¶ 20,795 (No. 7673, 1976), affirmed violations involving hazardous conditions that did not directly relate to work activities.

[8] The regulation in question, 29 C.F.R. § 1977.12, is an interpretive regulation adopted by OSHA to implement the Act's retaliatory discharge provision, 29 U.S.C. § 660(c)(1).

> retary's regulation must, therefore, be upheld, particularly when it is remembered that safety legislation is to be liberally construed to effectuate the congressional purpose.

445 U.S. at , 100 S.Ct. at 891 (footnote omitted). The United States Court of Appeals for the District of Columbia has held that although the Act makes no mention of Medical Removal Protection programs for employees exhibiting excessive blood lead levels the "fact of the statute and the legislative history both demonstrate unmistakably that OSHA's statutory mandate is, as a general matter, broad enough to include such a regulation. . . ." *United Steelworkers of America v. Marshall*, No. 79-1048, slip op. at 84 (D.C. Cir. Aug. 15, 1980).[9] The court also upheld the OSHA regulation prohibiting voluntary prophylactic chelation, 29 C.F.R. § 1910.1025(j)(4)(i), a potentially hazardous treatment voluntarily undertaken by employees and commonly performed by physicians not associated with the employer. 43 Fed. Reg. 53003-04 (1978). In addition, the Commission has concluded that "the Act's remedial jurisdiction is not limited to locations where work is actually performed," but is based on "whether a particular condition bears a sufficient nexus to employment to permit enforcement of the Act." *C.R. Burnett & Sons, Inc. and Harllee Farms*, 80 OSAHRC ——, 9 BNA OSHC 1009, 1018, 1980 CCH OSHD ¶ 24,964 at p. 30,816 (Nos. 78-1103 & 78-1105, 1980).[10]

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[9] The court took particular note of the argument advanced by Amici that without Medical Removal Protection regulations employers could discriminate against fertile women by excluding them from all lead-exposed jobs, concluding that "we think fertile women can find statutory protection from such discrimination in the OSH Act's own requirement that OSHA Standards ensure that '*no* employee will suffer material impairment of health . . . .' 29 U.S.C. § 655(b)(5) (1976)." *United Steelworkers of America v. Marshall, supra* at n. 74 (emphasis in original).

[10] In *Clarkson Construction Co. v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976), the Tenth Circuit rejected an employer's attempt to limit coverage of the Act to "workaites" as both "artificial" and

Section 5(a)(1) was stated in general terms in order for the Act to be responsive to the changing technological environments where employees work. Congress anticipated changes in the working environment and sought to bring within the Act's reach conditions and practices which could not be contemplated at the moment of enactment. Thus, the general duty clause affords the Secretary enforcement flexibility to protect employees in "unique" circumstances and embodies a delegation of authority to the Commission to develop through the adjudicatory process a body of law consistent with the public interest in safe and healthful working conditions and the changing realities of workplace hazards.[11] It was clearly assumed that responsible judgment would be exercised in the adjudicatory process and that the facts of each case would dictate the necessary application of the general duty clause.[12] As a consequence, "it is unimportant that the particular application may not have been contemplated by the legislators" if the statutory language "fairly brings the situation within a statute." *Barr v. United States*, 324 U.S. 83, 90 (1945).[13]

"specious," stating that "[t]o draw narrow boundaries which would have the effect of restricting the area of protection would effectively defeat the clear purpose of the statute . . . . We fail to see the logic in restricting the work area in some artificial manner, as a result of which the employer escapes responsibility." The Tenth Circuit also has indicated that in light of the Act's remedial purpose it "should not be given a narrow or technical construction." *Frohlick Crane Serv., Inc. v. OSHRC*, 521 F.2d 628, 631 (10th Cir. 1975).

[11] *See generally*, Note, Exclusionary Employment Practices in Hazardous Industries: Protection or Discrimination, 5 Colum. J. Envt'l L. 97, 120-130 (1978).

[12] *See generally, Van Beeck v. Sabine Towing Co.*, 300 U.S. 342 (1937) (Cardozo, J.); *T. J. Hooper*, 60 F.2d 737 (1932) (L. Hand, J.).

[13] *See generally*, B. Cardozo, *The Nature of the Judicial Process* 14-16 (1921); Curtis, A Better Theory of Legal Interpretation, 3 Vand. L. Rev. 407 (1950); Landis, Statutes and the Sources of Law in *Harvard Legal Essays* (1934).

In the course of adjudicating the "general and common duty" imposed by the Act,[14] no strict definitional test is possible for the application of this remedial provision having widespread application in rapidly changing working environments. We must construe general language in a statute, as Commissioner Cleary so aptly put it, "in favor of those it seeks to protect." *Prineville Mouldings, Inc.*, 74 OSAHRC 81/E12, 2 BNA OSHC 1334, 1335, 1974-75 CCH OSHD § 19,017 at p. 22,758 (No. 1045, 1974) (concurring opinion). In doing so we must take cognizance of the fact that as many as 20 million jobs involve exposure to substances that could pose reproductive hazards[15] and the list of newly developed chemicals and processes being introduced into the workplace grows daily.[16] At the same

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[14] In reporting the general duty clause, the Senate committee described the employer's duty in common law terms.

> The committee has concluded that such a provision is based on sound and reasonable policy. Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment "which is free from recognized hazards so as to provide safe and healthful working conditions," merely restates that each employer shall furnish this degree of care.

S.Rep. No. 91-1292, *supra*.

[15] 45 Fed. Reg. 7514 (1980). *See generally*, Council on Envt'l Quality, Exec. Office of the President, *Chemical Hazards to Human Reproduction* (1981).

[16] As Congressman Sikes observed in 1970: "In addition to the health hazards of other years, we find that technological advances and new processes have brought numerous new hazards to industrial plants. The picture is worsening in every field all over America." *Legis. Hist.* at 1061. *See generally*, Council on Envt'l Quality, Exec. Office of the President, *Toxic Chemicals and Public Protection* ch. I (1980).

time, it is simply not possible for the Secretary of Labor to promulgate standards for all of the new materials and processes confronted by working men and women. As a result, American workers, and the Secretary as their representative, must rely instead on the general duty imposed on employers by section 5(a)(1) to maintain workplaces free from recognized hazards. The exclusion of fertile women from certain employment invites employers to exclude other highly susceptible groups from employment when the effect varies among the exposed classes of individuals.[17] As a result, the burden for safety and health is borne by the employees.

IV

One fact is inescapable in this case. Five American Cyanamid employees have been sterilized. As a matter of law, this irreversible termination of their child-bearing capacity is a material impairment of functional capacity resulting from a condition of employment imposed by their employer. This loss of reproductive capacity, whether actively or passively coerced, runs counter to the stated Congressional policy of assuring "insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience." 29 U.S.C. § 651(b)(7).[18]

The citation and complaint raise triable issues under section 5(a)(1) of the Act and the case should be remanded for further proceedings on the merits.

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[17] Waritz, *Biological Indicators of Chemical Dosage & Burden* in 3 *Patty's Industrial Hygiene and Toxicology* 257 (1979).

[18] The Secretary argues for an "incident of employment" test for applicability of the general duty clause. However, since the cited hazard in this case is alleged as a coercive condition of employment it is not necessary to determine whether an alleged hazard less directly related to employment is cognizable under the Act.

Appendix A: MEMORANDUM OPINION

On December 20, 1979, the Respondent, American Cyanamid, applied for my voluntary recusal, requesting that I not participate in any decision-making concerning this case and other cases before the Commission to which American Cyanamid is a party. The Respondent has also moved to question me on *voir dire* with respect to whether I should participate in these proceedings.

American Cyanamid contends that certain "objective circumstances" suggest that my "impartiality might reasonably be questioned" within the meaning of 29 U.S.C. § 455(a) [1] and Canon 3C of the Code of Judicial Conduct.[2] Specifically, American Cyanamid alleges:

> 1. The Oil, Chemical, and Atomic Workers International Union ("OCAW") filed the complaint that led to this litigation.

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[1] 29 U.S.C. § 455(a) provides:

> § 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy
>
> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

[2] Canon 3C provides, in pertinent part, the following:

> C. DISQUALIFICATION.
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where;
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

2. Mr. Steven Wodka of OCAW has been involved in these proceedings.

3. Dr. Eula Bingham, then Assistant Secretary of Labor for Occupational Safety and Health Administration ("OSHA"), was "involved in the decision to bring at least the general duty clause case."

4. I have certain "relationships" with OCAW and OSHA personnel involved in this case, including:

(a) a friendship with Mr. Wodka.

(b) prior employment as an attorney for an organization that has served as outside counsel for OCAW (the Health Research Group),

(c) the hiring of a former Health Research Group employee to be my assistant at the Review Commission, and

(d) prior employment as special assistant to Dr. Bingham prior to becoming a member of the Commission.

American Cyanamid is of the belief that "these circumstances objectively establish reasonable grounds for questioning [my] impartiality" if I participate in this case. Having considered the motions, related memoranda and affidavits, I have concluded that the applications are insufficient to warrant disqualification and are DENIED. In addition, the motion to *voir dire* is DENIED.

A

The appropriate tests for disqualification in administrative proceedings, *Cinderella Career and Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583 (D.C. Cir. 1970), and judicial proceedings, 28 U.S.C. § 445 and Canon 3C of the Code of Judicial Conduct, are fully set forth in my separate opinion in *National Manufacturing Co.*, 80 OSAHRC, 8 BNA OSHC 1435, 1980 CCH OSHD ¶ 24,519

(No. 76-4757, 1980). It is important to note that, although the truth of the matters alleged in an affidavit of disqualification must be accepted as true for the purpose of determining legal sufficiency, it is appropriate to put the facts alleged into proper context and to examine the surrounding circumstances. *National Manufacturing Co., supra.* I will review American Cyanamid's application in light of these standards.

B

American Cyanamid questions whether I am personally biased in favor of certain parties in this case because of what it claims is my relationship and friendship with OCAW and OSHA employees, including Mr. Wodka. Friendship as a basis for disqualification has been held to be insufficient to give fair support to a charge of personal bias or prejudice. Allegations of lack of impartiality stemming from acquaintanceship or friendship with a party's counsel that "does not exceed what might be expected as background or associational activities . . . fall short of supporting an inference of lack of impartiality under § 455(a)." *Parrish v. Board of Commissioners of Alabama State Bar*, 524 F.2d 98, 104 (5th Cir. 1975). General allegations of bias based on the background and association of a judge do not provide a reasonable basis for concluding that a judge cannot be impartial. *See Parker Precision Products Co., Inc. v. Metropolitan Life Insurance Co.*, 407 F.2d 1070, 1077 (3d Cir. 1969); *Simmons v. United States*, 89 F.2d 591 (5th Cir.), *cert. denied*, 302 U.S. 700 (1937). American Cyanamid has alleged no facts upon which it reasonably could be concluded that an appearance of impropriety sufficient to warrant disqualification exists. *See also SCA Services, Inc. v. Morgan*, 557 F.2d 110 (7th Cir. 1977).

Respondent further implies that my impartiality might reasonably be questioned because of my representation of OCAW in certain OSHA proceedings unrelated to this case

prior to the time I became a member of the Commission. From August 1972 until October 1975, I served as a staff attorney for the Health Research Group ("HRG"), a public interest group. Consistent with my responsibilities at HRG I represented OCAW in a number of administrative and judicial proceedings. My legal representation of OCAW in one proceeding continued after my association with HRG terminated and ended when I joined the Department of Labor in April 1977. The union complaint that initiated the proceedings in this case was not filed until 1978. Accordingly, the enforcement stage of these proceedings had not even commenced when I served as counsel for OCAW. Furthermore, based on my personal knowledge and the affidavit of Mr. Steven Wodka, I never discussed this case with him or any other representative of OCAW.[8]

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[8] The text of Mr. Steven Wodka's sworn affidavit filed in response to the Respondent's disqualification motion states the following:

> 1. I am employed by the Oil, Chemical and Atomic Workers International Union as an International Representative. I have been the representative of the Union in the two cases entitled *Secretary of Labor v. American Cyanamid Company*, OSHRC Docket Nos. 79-2438 and 79-5762. Also, I was the author of and signator to the complaint to OSHA on December 27, 1978 that gave rise to the inspection and subsequent OSHA citations that are the subject of these two dockets. I am knowledgeable of all actions taken by the Union in its representation of its members in these cases.
>
> 2. I have never discussed nor communicated the merits of either of these *American Cyanamid* cases with Bertram Cottine. I never have been in a meeting with Bertram Cottine where the merits of either of these *American Cyanamid* cases have been discussed.
>
> 3. At the time when Bertram Cottine did act as counsel to the OCAW, these two cases were not being handled by myself nor was I knowledgeable of the facts in these two cases.
>
> 4. Moreover, I do not know of any discussions, meetings or communications between any other representatives of the OCAW and Bertram Cottine concerning the merits of these *American Cyanamid* cases.

Neither the administrative nor statutory standards for recusal require the disqualification of a judge hearing a case because one of the parties is a former client. A judge is not required to disqualify himself merely because he or she previously represented a party if the case in which the judge is sitting is not connected with any matter on which the judge previously acted as counsel. *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2d Cir. 1978); *In re Rogers*, 537 F.2d 1196 (4th Cir. 1976); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959); *School District of Kansas City v. Missouri*, 438 F.Supp. 830 (W.D. Mo. 1977; *see* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3544 at 357 (1975)[4]

American Cyanamid also alleges that my impartiality might be questioned because of my prior employment as an assistant to Dr. Bingham. American Cyanamid implies that I may have participated in OSHA's decision to commence enforcement proceedings in this case. While employed at OSHA I did not participate in any aspect of this case. My employment at the Department of Labor terminated before OCAW filed the complaint that initiated the inspection in this case. Neither Dr. Bingham nor any member of her staff discussed the merits of this case with me during the time that I served at the Department of Labor.[5] In the absence of actual contact with the merits

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[4] My hiring of a former HRG employee as my administrative assistant at the Review Commission has no bearing on this matter.

[5] The text of the sworn affidavit of Dr. Eula Bingham filed in support of Complainant's Opposition to the Recusal of Commissioner Bertram R. Cottine states the following:

1. I am the Assistant Secretary of Labor for the Occupational Safety and Health Administration, U.S. Department of Labor.

2. I have never discussed nor communicated the merits of the OSHRC cases entitled *Secretary of Labor v. American Cyanamid Company*, OSHRC Docket Numbers 79-2438, 79-4876 and 79-5762 with Bertram Cottine during the period of time

of a particular case, mere prior employment in a party agency is insufficient to suggest to a reasonable person that a judge's impartiality may be in question and is not grounds for disqualification. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 761 (1973); see *Laird v. Tatum*, 409 U.S. 824 (1972).

It is clear that disqualification on the grounds of impartiality must have a reasonable basis. H.R. REP. No. 93-1453, 93d Cong., 2d Sess. 4-5, *reprinted in* [1974] 3 U.S. CODE CONG. & AD. NEWS 6351, 6354-55. The allegations in this case fail to "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *U.S. v. Haldeman*, 559 F.2d 31, 134 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), *quoting Berger v. U.S.*, 255 U.S. 22, 33-4 (1921). The motion for disqualification is denied.

C

Finally, the Respondent's motion to *voir dire* is also denied. The facts alleged as a basis for disqualification have been taken as true for the purpose of assessing the sufficiency of the claims. The claims have been fully considered. An evidentiary hearing is unnecessary. *See U.S. v. Mitchell*, 377 F.Supp. 1312, 1316 (D.D.C. 1974), *aff'd sub. nom. U.S. v. Haldeman*, *supra*.

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that he served as my assistant nor at any other subsequent time. Further, I have never been in attendance at any meeting with Bertram Cottine where the merits of the above numbered cases were discussed.

3. I have further determined that, to the best of my knowledge, no member of my staff has discussed the merits of the instant cases with Bertram Cottine at any meeting and that Mr. Cottine did not influence the decision to issue this citation in light of his departure from the Department of Labor prior to the issuance of this citation.

Bare suspicions cannot serve as a basis "for extended fishing expeditions" in the hope of discovering a basis on which to challenge agency action. *Caro, Inc. v F.T.C.*, 338 F.2d 149, 153 (1st Cir. 1964); *cf. San Francisco Mining Exchange v. SEC*, 378 F.2d 162 (9th Cir. 1967) (absent factual allegations and offer of proof tending to support charge of bias and prejudice, issuance of a subpoena directed to SEC Commissioners for purpose of ascertaining their state of mind during the decisional process is improper); *School Services, Inc.*, 71 F.T.C. 1703 (1967) (subpoena probing internal decision-making process of the F.T.C. will not be issued when based on mere suspicion).

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 79-5762

SECRETARY OF LABOR,
Complainant,

v.

AMERICAN CYANAMID COMPANY,
Respondent

and

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND LOCAL 3-499,
Affected Employee Representative

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter comes on for determination upon a Motion for Summary Judgment (R.p. J-33),[1] filed pursuant to Federal Rule of Civil Procedure 56,[2] made applicable

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[1] References are to pages in the official Review Commission Docket File of this case.

[2] FRCP 56, in pertinent part, provides:

Summary Judgment

* * *

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

[Continued on page 53a]

to this proceeding by Review Commission Rule 2(b), 29 C.F.R. 2200.2(b),[3] by American Cyanamid Company (Respondent).

This case arises from an inspection of Respondent's Willow Island, West Virginia plant, conducted by Compliance Officers of the Occupational Safety and Health Administration, U.S. Department of Labor (OSHA) from January 4 to April 13, 1979. Following this extended inspection, and on the 180th day after April 13, 1979[4], Complainant issued a "Willful" Citation to Respondent on October 9, 1979, at its Willow Island plant, alleging a violation of Section 5(a)(1) of the Act,[5] ". . . on or about the day the inspection was made . . .", as follows:

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[3] [Continued]

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[3] Review Commission Rule 2(b) provides:

* * *

(b) In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

There is no Review Commission Rule applicable to Motions for Summary Judgment.

[4] Section 9(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 658(c) (the Act) provides that; "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

[5] This "General Duty" section provides:

DUTIES

Sec. 5.(a) Each employer—

(1) Shall furnish to each of his employees employment and a place of employment which are free from recog-

Section (5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that: The employer adopted and implemented a policy which required women employees to be sterilized in order to be eligible to work in those areas of the plant where they would be exposed to certain toxic substances:

(a) Inorganic Pigment Department--
Buildings No. 85 and No. 86.

Abatement was ordered "Immediately" and a penalty of $10,000 was proposed. (R.pp. 1 of 2).[6]

On October 11, 1979, Respondent timely filed its Notice contesting this Citation, pursuant to Section 10(a) of the Act, 29 U.S.C. 659(c) (R.p. 3).

On November 2, 1979, Complainant filed its Complaint specifically incorporating the Citation therein (R.p. 6, para. V.).

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nized hazards that are causing or are likely to cause death or serious physical harm to his employees;

29 U.S.C. 654(a)(1)

[6] This Citation on its face is deficient as it does not comply with the particularity requirements of Section 9(a) of the Act, which in pertinent part provides:

Sec. 9.(a)

* * *

Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation or order alleged to have been violated.

What the ". . . certain toxic substances . . ." alluded to in this Citation might be cannot be ascertained from either the Citation or the Complaint. In light of later Pretrial Discovery proceedings, however, it becomes obvious that the ". . . certain toxic substance . . ." referred to was lead. Thus the vagueness of this Citation has been cured and forms no basis for the ruling herein.

On November 16, 1979, Respondent filed its Answer to the Complaint (R.p. 7).

After assignment of this case to the undersigned on December 14, 1979, (R.p. 10), there followed various requests by both parties for rather extensive prehearing discovery, culminating on April 1, 1980, with an on-the-record prehearing conference (Tr. 1-152).

Thereafter Complainant's Petition for Interlocutory Appeal under Commission Rule 75, 29 C.F.R. 2200.75 was denied by Commission Order dated May 12, 1980 (R.p. J-35).

On May 6, 1980, Respondent filed its Motion for Summary Judgment with its Memorandum of Points and Authorities in Support thereof ruled upon herein (R.p. J-33).

Complainant's Motion for a 45-day extension of time within which to respond to Respondent's Motion for Summary Judgment (R.p. J-37), was, in part, granted by Order dated May 15, 1980, setting June 16, 1980, as the submission date. This time was further extended to June 30, 1980, upon Complainant's request of June 12, 1980 (R.p. J-44, J-45).[7]

I

This case involves a policy implemented by Respondent at its Willow Island plant prior to the inspection herein, under which female employees of presumed childbearing capacity were precluded from being assigned to, bidding into or holding any production jobs in the In-

[7] By letter dated June 3, 1980, from Attorney Carol Oppenheimer, (R.p. J-41) the Center For Law and Social Policy, the Coalition for the Reproductive Rights of Workers, (CRROW or the Coalition) requested permission to intervene in this case as a non-party. This request was granted pursuant to Review Commission Rule 21, 29 C.F.R. 2200.21 by Order dated June 5, 1980 (R.p. J-42). The Coalition's Motion to extend the period to June 30, 1980, within which it might file its Opposition to Respondent's Motion for Summary Judgment dated June 13, 1980 (R.p. J-46) was granted by Order dated June 16, 1980 (R.p. J-47).

organic Pigment Department, located in buildings numbered 85 and 86, wherein they would be occupationally exposed to lead.[8] Any female employee 50 years old or younger could rebut the presumption of childbearing capacity by presenting evidence that her ability to become pregnant had been precluded by surgical means, the so-called Fetus Protection Policy.

In January, 1978, Respondent announced its Fetus Protection Policy at its Willow Island plant, putting it into effect in October, 1978.

Between February and July, 1978, five female production employees, then employed in Respondent's Inorganic Pigment Department, underwent elective surgery at a hospital with no connection to Respondent, to preclude their ability to become pregnant, i.e., the sterilizations, allegedly in order to continue their employment in the Pigment Department at Respondent's plant.

During the recorded Prehearing Conference held on April 1, 1980, Complainant's counsel repeatedly stated[9] that it was Complainant's legal position that the "recognized hazard" under Section 5(a)(1) of the Act, which the Secretary alleges in this case, was the sterilization of the five women employees who worked at Respondent's Willow Island plant, (Tr. 28, 41-43, 46, 51, 63, 75-76, 112), and not the agreed upon and concededly high lead levels found in Respondent's buildings numbered 85 and 86 as well as in the blood of employees working in that department.[10]

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[8] The lead cromate operation, according to unrebutted assertions of Respondent, was permanently shutdown in early 1980.

[9] Complainant is bound by statements of counsel at a Prehearing Conference. See United States v. Tampa Bay Garden Apartments, Inc. & Tampa Bay Manor, Inc. et al., 294 F.2d 598, (5th Cir. 1961).

[10] A separate OSHA case, arising from the same inspection as is involved in this case in which this Respondent was charged with

There is no conflict in this record as to Complainant's legal position.

Furthermore, there is no conflict herein, i.e., there is no issue of material fact, concerning the following:

1) The sterilizations all occurred between February, 1978, and at the latest, July, 1978 (Tr. 61, 108-109; R.p. J-39 at 8-10, R.p. J-31 at 5).

2) Respondent's Fetus Protection Policy, which allegedly precipitated these sterilizations was implemented in either September or October of 1978 (Tr. 109-110; R.p. J-39 at 10, R.p. J-31 at 5).

Section 9(c) of the Act, 29 U.S.C. 658(c), set forth, *supra*, in fn. 3, in effect, is a statute of limitations, prohibiting the issuance of any Citation, ". . . after the expiration of six months following the occurrence of any violation." (*See* also OSHA regulation at 29 C.F.R. 1903.14(a)). The legislative history of this Section of the Act so holds, Conf. Rep. No. 91-1765, 91st Cong., 2d Sess. 38 (1970), reprinted in (1970) U.S. Code Cong. & Ad. News 5228, 5234, as have the U.S. Courts of Appeals, *Brennan* v. *Chicago Bridge and Iron Co.* 514 F.2d 1082, 1084 (7th Cir. 1975), *United States* v. *Dye Construction Company*, 510 F.2d 78, 82-83 (10th Cir. 1975), and the Review Commission has vacated Citations issued beyond this statutory six-month limitation period, *Secretary of Labor* v. *Wean United, Inc.*, OSHRC Docket No. 77-4350 (September 7, 1979), 7 OSHC (BNA) 2086; *Secretary of Labor* v. *Dravo Corp.*, OSHRC Docket No. 1487 (April 18, 1975), 3 OSHC (BNA) 1085.

The record herein is without conflict that the alleged Section 5(a)(1) violation, the sterilization of the five

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violating the then effective lead standard, has been litigated before Commission Judge Cutler and is in the decisional stage—OSHRC Docket No. 79-2438.

women employees of Respondent, all took place prior to August, 1978. The Citation herein was not issued until October 9, 1979. The interval between the alleged last violation and the issuance of this Citation thus was not less than 14 months.

Further, there is no conflict in this record that Respondent implemented its Fetus Protection Policy at its Willow Island plant in September or October, 1978. Thus, under Complainant's tangential theory of the case, that Respondent's Fetus Protection Policy imposed an impermissible condition of continued employment in the Inorganic Pigment Department upon women of childbearing capacity, i.e., a "requirement" to be sterilized, also occurred a full year prior to the issuance of the Citation herein.

Additionally, Complainant does not allege that any sterilizations occurred after July, 1978. Furthermore, Respondent states in its Memorandum in Support of the Motion for Summary Judgment, (R.p. J-33 at p. 21) that during the extended inspection herein from January 4 to April 13, 1979, - - "no employee of childbearing capacity was working in a production job in Buildings 85 or 86, and thus even on Complainant's theory, no employee then could have been "required" [as a condition of continued employment] to elect surgical sterilization to comply with the Fetus Protection Policy." Nothing in this record controverts this factual allegation.

This record is totally barren of any allegation that there were any sterilizations in the six-month period between the conclusion of the inspection and issuance of the Citation herein.

Based upon the totally undisputed facts set forth *supra*, the issuance of the Citation in this case is barred by the six-month statute of limitations set forth in Section 9(c) of the Act, 29 U.S.C. 658(c), and as a matter

of law,[11] Respondent's Motion of Summary Judgment, based upon this ground, must be granted.

II

There is a second ground present in this case, which mandates the granting of Respondent's Motion for Summary Judgment.

Under Complainant's sometimes illusively shifting theory of this case, Respondent's Fetus Protection Policy, "required," as a condition of employment of women with childbearing capacity in the Inorganic Pigment Department, to elect, i.e., were "forced," to be surgically sterilized. This constituted an impermissible "condition of employment," which, somehow is prohibited by the General Duty Clause of the Act, Section 5(a)(1), 29 U.S.C. 654(a)(1).

Under this theory, Complainant misconstrues the plain wording of Section 5(a)(1), which mandates that employers "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

If Respondent's Fetus Protection Policy can legally be held accountable for "requiring"[12] female sterilization as

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[11] ". . . defendant may employ a summary judgment motion to assert a defense that entitles him to judgment as a matter of law. In [this] situation the procedure prescribed by Rule 56 affords a means of avoiding the delay and expense of a full trial when the action involves only a legal point and there are no triable issues of fact."

[12] If the five female employees who underwent surgical sterilization believe that they have suffered a legally, cognizable wrong because of any misinformation conveyed to them by Respondent concerning the terms or implementation of the Fetus Protection Policy, the State, and assumedly the Federal Courts are available to them for redress in an appropriate tort action. There is some indication in this record that the Union believes such conditions may have existed.

a "condition of employment" in its Pigment Department, two other laws speak to such an issue, the National Labor Relations Act (NLRA) as an alleged unfair labor-practice and/or Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, as an alleged impermissible "sex based" discrimination issue.[13]

Section 2000e-2 of the Civil Rights Act of 1964, provides:

> § 2000e-2. Unlawful employment practices—Employer practices
>
> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
>
> 42 U.S.C. 2000e-2

The Pregnancy Discrimination Act, Pub. L. No. 95-555, (which added a subsection (k) to Section 701, 42 U.S.C. § 2000e), makes it clear that the "sex" criterion of 42 U.S.C. 2000e-2, *supra*, includes pregnancy, childbirth, and related conditions. This amendment in relevant part provides:

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[13] Evidentially Respondent's employees and their union have filed a complaint against Respondent alleging that its Fetus Protection Policy violated the Civil Rights Act of 1964 (Tr. 124).

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .

The legislative history indicates that Congress intended the amendment to

> apply to all aspects of employment—hiring, reinstatement, termination . . . and other conditions of employment currently covered by Title VII . . . In using the broad phrase "women affected by pregnancy, childbirth and related medical conditions," the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.
>
> *See* H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 4, 5, reprinted in (1978) U.S. Code Cong. & Ad. News 4749, 4752-53.

The Equal Employment Opportunity Commission (EEOC), of the Department of Labor, issued "Interpretive Guidelines on Employment Discrimination and Reproductive Hazards" on February 1, 1980, 45 Fed Reg. 7514 (see copy attached to Respondent's Memorandum in Support of its Motion for Summary Judgment, R.p. J-33, "Attachment A"), which specifically covers practices such as Respondent's Fetus Protection Policy.

Section 4(b)(1) of the OSHA Act, in pertinent part provides:

* * *

> (b)(1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, ... exercise statutory authority

to prescribe or enforce standards or regulations affecting occupational safety or health.

Under the unfair labor practice provisions of the National Labor Relations Act and particularly under the foregoing provisions of Title VII of the Civil Rights Act of 1964, as amended, it is clear that Section 5(a)(1) of the OSHA Act, 29 U.S.C. 654(a)(1), does not "apply" to Respondent's Fetus Protection Policy, because other Federal Agencies, (EEOC and/or the National Labor Relations Board) have exercised statutory authority governing the practice complained of in this case. See *Secretary of Labor* v. *Pennsuco Cement and Aggregates, Inc.*, OSHRC Docket No. 15462 (May 8, 1980), 8 OSHC (BNA) 1378, and cases cited therein.

Thus, as a matter of law, under the provisions of Section 4(b)(1) *supra*, the Occupational Safety and Health Act of 1970 does not apply to Respondent's Fetus Protection Policy.

Based upon the foregoing, it is hereby,

ORDERED:

1. That Respondent's Motion for Summary Judgment is *GRANTED*.

2. That the "Willful" Citation, issued to Respondent on October 9, 1979, is *VACATED*.

/s/ William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: July 15, 1980
Hyattsville, Maryland

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

Argued 12-3-81

No. 81-1687

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and LOCAL 3-499, OIL, CHEMICAL and ATOMIC WORKERS,
Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondent

Filed Feb. 26, 1982

Before: Wald, Mikva and Edwards, Circuit Judges

ORDER

This matter is presently before the Court on motions of the American Cyanamid Company to intervene and to dismiss and on the motion of petitioners to amend and reform the caption. These motions are decided as set forth in the opinion of the Court issued this date.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
APR 26 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1784

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

AMERICAN CYANAMID COMPANY,
Petitioner,
v.
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals has jurisdiction to consider a petition for review of an order of the Occupational Safety and Health Review Commission filed by a union that had intervened in administrative enforcement proceedings brought against an employer by the Secretary of Labor, when the petitioning union is aggrieved by the Commission's order and when no other party has sought review.

2. Whether the Occupational Safety and Health Review Commission may participate actively as a party in a court of appeals in proceedings brought for review of a Commission decision.

3. Whether the court of appeals properly permitted amendment of a review petition to acknowledge substitution of party respondents when said petition was timely filed in compliance with all jurisdictional requirements and when the party being substituted as respondent was served with notice of the petition at the time it was initially filed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
1. The right of a union intervenor to obtain judicial review of a Commission decision	3
2. Authority of the Commission to participate as a party in judicial review of its decisions	6
3. Substitution of Cyanamid for the Commission as named respondent in OCAW's petition for review	7
CONCLUSION	9

TABLE OF AUTHORITIES

CASES: Page

Consolidated-Andy, Inc. v. Donovan, 642 F.2d 778 (5th Cir. 1981) 7, 8
Hoerner Waldorf Pan American Bag Co. v. OSHRC, 614 F.2d 795 (1st Cir. 1980) 7, 8
L.E. White v. United States, 342 F.2d 481 (8th Cir. 1965) 9
Marshall v. OCAW, 647 F.2d 383 (3d Cir. 1981) 4
Marshall v. OSHRC, 635 F.2d 544 (6th Cir. 1980) 4
Marshall v. Sun Petroleum Products Co. 622 F.2d 1176 (3d Cir.), cert. denied, 449 U.S. 1061 (1980) 4, 6
Midway Industrial Contractors, Inc. v. OSHRC, 616 F.2d 346 (7th Cir. 1980) 7, 8
Newspaper Drivers v. Detroit Newspaper Publishers Assn., 382 U.S. 374 (1966) 5
UAW v. OSHRC, 557 F.2d 607 (7th Cir. 1977) 5
United States v. Fornea Road Boring Co., 565 F.2d 1314 (5th Cir. 1978) 7

STATUTES:

The Occupational Safety and Health Act of 1970
Section 10(c), 29 U.S.C. § 659(c) 2, 4, 6
Section 11(a), 29 U.S.C. § 660(a) 2, 3, 4, 8, 9

42 U.S.C. § 405(g) 8, 9

RULES AND REGULATIONS:

Federal Rules of Appellate Procedure Rule 15(a) 2, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1784

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, and LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT

Petitioner American Cyanamid Company ("Cyanamid") seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit rejecting Cyanamid's jurisdictional challenge to a petition filed by the Oil, Chemical and Atomic Workers International Union and its Local 3-499 (hereinafter jointly referred to as "OCAW") for review of an order of the Occupational Safety and Health Commission ("the Commission"). The Commission's order dismissed a citation issued against Cyanamid by the Secretary of Labor ("the Secretary") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("the

Act"). The citation concerned Cyanamid's plant at Willow Island, West Virginia and alleged, *inter alia*, that Cyanamid had "adopted and implemented a policy which required women employees to be sterilized in order to be eligible to work in those areas of the plant where they would be exposed to certain toxic substances." App. 54a. The Commission dismissed the citation on the ground that the challenged policy was not a hazard cognizable under the Act.

OCAW represents the employees at Willow Island who are affected by Cyanamid's policy at issue in the proceedings below. OCAW filed the complaint with the Secretary that prompted a federal inspection and, thereafter, the citation. And when Cyanamid contested the citation, OCAW was granted leave to intervene and to participate as a party in the proceedings before the Commission pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). Upon dismissal of the citation, OCAW filed a petition for review in the District of Columbia Circuit pursuant to § 11(a) of the Act, 29 U.S.C. § 660(a), which provides that "[a]ny person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order . . . in the Court of Appeals for the District of Columbia Circuit." OCAW named the Commission as the respondent pursuant to Rule 15(a), F.R.A.P., which provides that when review is sought of the order of any "agency" (including any "commission"), "[i]n each case the agency shall be named respondent."

Cyanamid moved to participate in the circuit court proceedings as *amicus curiae* and for leave to intervene should the court proceed to the merits of the case. Cyanamid also moved to dismiss OCAW's petition for review on the ground that the Act does not permit unions to seek review of a decision by the Commission dismissing a citation. Cyanamid further contended that the Commission was a nominal party that could not properly respond to a petition for review, and that OCAW's petition should

be dismissed because no other party had been named as a respondent. The Secretary, as *amicus curiae*, supported OCAW in opposing Cyanamid's jurisdictional challenge. The Court of Appeals rejected Cyanamid's contentions.[1]

SUMMARY OF ARGUMENT

The District of Columbia Circuit correctly disposed of Cyanamid's jurisdictional challenge. And the decision below does not conflict with the decision of any other court of appeals on any point that is material to the disposition of the case.

ARGUMENT

1. The right of a union intervenor to obtain judicial review of a Commission decision.

The first issue presented by Cyanamid's petition, as Cyanamid itself has framed it, is whether "the *court of appeals* has jurisdiction to consider a petition for review of an *order of the* [*Commission*] filed by a union which had intervened in administrative enforcement proceedings brought against an employer by the Secretary of Labor, where no other party has sought review." Petition, at i (emphasis added). The court below answered this question affirmatively. Cyanamid maintains that this decision conflicts with decisions by the Third, Sixth, and Seventh Circuits. No such conflict exists, however, because the decisions on which Cyanamid relies do not address the issue set forth above, *i.e.*, the jurisdiction of a court of appeals to review a Commission decision; instead, they concern the discrete question whether, in *proceedings before the Commission*, a union may challenge "prosecutorial" judgments made by the *Secretary*.

These distinct issues are governed by different statutory provisions. Appellate court jurisdiction to review Commission decisions is established in § 11(a) of the

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[1] At Cyanamid's request, the court below deferred briefing on the merits of OCAW's review petition pending resolution by this Court of Cyanamid's petition for a writ of certiorari.

Act, 29 U.S.C. § 660(a), which provides that "[a]ny person adversely affected or aggrieved by an order of the Commission . . . may obtain a review of such order" in an appropriate reviewing court. The Commission order involved here dismissed a citation that had been issued on the basis of OCAW's complaint with respect to a policy that has harmed OCAW's members. OCAW is clearly a person "adversely affected or aggrieved" in these circumstances, and none of the cases on which Cyanamid relies indicates otherwise.

In contrast, the issue addressed by these cases—what, if any, limitations apply to union participation in *Commission* proceedings—is governed not by § 11(a) but by § 10(c), 29 U.S.C. § 659(c), which provides that a union may initiate a hearing before the Commission to contest "the period of time fixed in [a] citation for the abatement of [a] violation," and further directs that the Commission shall provide the union representing affected employees "an opportunity to participate as [a] part[y]" to all Commission hearings, including hearings (such as was conducted in this case) initiated by an employer who wishes to contest a citation for any reason. The cases on which Cyanamid relies interpret the application of *this* provision, not § 11(a), to union participation in *Commission* proceedings.

Further, as noted, the decisions of the Third, Sixth, and Seventh Circuits focus specifically on union challenges to the Secretary's exercise of prosecutorial discretion. See *Marshall v. Sun Petroleum Products Co.*, 622 F.2d 1176, 1184-1186 (3d Cir.), cert. denied, 449 U.S. 1061 (1980) (union sought to contest a settlement between the Secretary and the employer on the ground that the particular method of abatement would be inefficacious); *Marshall v. OCAW*, 647 F.2d 383 (3d Cir. 1981) (union sought to contest a settlement agreement on the ground that abatement had not occurred); *Marshall v. OSHRC*, 635 F.2d 544 (6th Cir. 1980)

(union sought to prosecute a citation after the Secretary moved to vacate it); and *UAW v. OSHRC*, 557 F.2d 607, 610-611 (7th Cir. 1977) (union sought to challenge substantive provisions of an abatement plan incorporated into a settlement agreement). Citing these decisions, the court below expressly agreed that a union should not be permitted to assert challenges to prosecutorial judgments made by the Secretary, App. 12a-13a, but held that OCAW's petition for judicial review of the *Commission's* dismissal of the Secretary's citation involved no such challenge. As the court below explained, "OCAW is not seeking review of the Secretary's decision [not to appeal the Commission's ruling];[2] instead, it is seeking judicial review of an order of the [Commission], an independent adjudicatory body." App. 13a.[3] In fact, the Secretary himself emphasized in the court below that OCAW's review petition did not entail a challenge to his prosecutorial discretion; and accordingly the Secretary, while maintaining that the cases upon which Cyanamid relies had been rightly decided, agreed with OCAW that those

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[2] Thus, OCAW is not seeking an order by the court of appeals compelling the Secretary to appeal the Commission's ruling, but is seeking an order setting aside the Commission's ruling, which would enable the Secretary to resume prosecution of his citation before the Commission should the Secretary choose to do so.

[3] As the court below noted, its conclusion is in accord with principles applied in analogous contexts, in which a private charging party's inability to initiate a *prosecution*, or to compel the *prosecutorial* arm of an agency to initiate a prosecution, before an administrative adjudicatory body does not bar the private party from obtaining judicial review of an adverse ruling by the *adjudicatory* body. App. 11a n.6 (discussing cases under the National Labor Relations Act). In such other contexts, the private party's right to appeal has not been conditioned on whether the "prosecutor" chooses to appeal. See, *e.g.*, *Newspaper Drivers v. Detroit Newspaper Publishers Assn.*, 382 U.S. 374 (1966) (granting union's petition for certiorari from a decision denying enforcement of a Board order, and remanding the case to the court of appeals with instructions that it be remanded to the Board for further consideration, in a case in which the Board had not petitioned for certiorari).

cases are inapposite here, and joined with OCAW in opposing Cyanamid's motion to dismiss. Thus, whether or not the Third, Sixth, and Seventh Circuits—and the court below in approving the rulings of those courts—correctly barred union challenges to "prosecutorial" decisions by the Secretary, that concern is not implicated in this case, as the court below properly held.[4]

2. Authority of the Commission to participate as a party in judicial review of its decisions.

The second issue that Cyanamid presents for review is whether the Commission may actively participate as a party in judicial proceedings for review of Commission decisions. Although, as Cyanamid states, the courts of appeals are divided on this issue, the outcome of this case is not controlled by the resolution of the issue. As the District of Columbia Circuit's decision makes clear,

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[4] Sidestepping the real issue in this case—the circuit court's jurisdiction to entertain OCAW's review petition—Cyanamid focuses on the discussion by the court below of a union's party status in proceedings before the Commission in an attempt to demonstrate a conflict with the decisions of the Third, Sixth, and Seventh Circuits. Petition, at 7-8. As we have indicated, the fact that this case involves a petition for *judicial* review of a Commission order distinguishes the cases on which Cyanamid relies. But even the comments by the court below regarding OCAW's right to participate in proceedings before the *Commission*—which, as we have discussed, are governed by § 10(c) of the Act—are not at odds with the decisions on which Cyanamid relies. In the proceedings before the Commission, OCAW participated in *support* of the Secretary. The decisions on which Cyanamid relies cannot fairly be read to preclude a union from participating in support of the Secretary during Commission proceedings, but only to preclude a union from *challenging* in such proceedings prosecutorial decisions made by the Secretary. *Sun Petroleum*, on which Cyanamid relies most heavily, actually held only that "any *challenge* advanced by an employee [to a settlement entered into by the Secretary] is limited to an *attack* on the reasonableness of the abatement period." 622 F.2d, at 1186 (emphasis added). In this connection, it is revealing that at no time has Cyanamid raised any objection to OCAW's participation in the Commission proceedings.

OCAW's petition for review by that Court has been perfected whether or not the Commission may participate as a party respondent in that proceeding. (Only if this Court were to reverse the District of Columbia Circuit's resolution of the third issue presented for review would the Commission's party status become arguably material to the disposition of this case. We later show, however, that the third issue does not warrant review by this Court.) As Cyanamid acknowledges, Petition, at 9-10 and n.8, Cyanamid *supports* the District of Columbia Circuit's ruling on the Commission's party status. The Commission, itself, has not sought to participate in the proceedings before the court below. And OCAW is indifferent as to whether the Commission has party status. (In fact, OCAW took no position on this matter in the court below.) Given that a reversal of the circuit court's resolution of this second issue would not change the outcome of this case, and given the lack of adversity among the parties on this point, the instant case does not present an appropriate occasion for addressing the Commission's status as a party in judicial review proceedings.

3. Substitution of Cyanamid for the Commission as named respondent in OCAW's petition for review.

The final issue that Cyanamid presents for review is whether the court below properly permitted substitution of Cyanamid for the Commission as named respondent in OCAW's petition for review after the time for filing a review petition in the first instance had expired. Cyanamid asserts that the District of Columbia's decision on this issue "conflicts with the decisions of three other circuits that the failure to file a proper petition for review of a Commission decision, even for excusable neglect, is a jurisdictional defect precluding consideration of the petition for review." Petition, at 12, citing *Hoerner Waldorf Pan American Bag Co. v. OSHRC*, 614 F.2d 795, 796 (1st Cir. 1980); *Consolidated-Andy, Inc. v. Donovan*, 642 F.2d 778, 779 (5th Cir. 1981); *United States v. Fornea Road*

Boring Co., 565 F.2d 1314, 1316 (5th Cir. 1978); *Midway Industrial Contractors, Inc. v. OSHRC*, 616 F.2d 346, 347 (7th Cir. 1980). No such conflict exists, however, because these decisions did not address the issue decided by the court below.

The decisions on which Cyanamid relies sustained jurisdictional challenges when *no* petition was filed within the statutorily prescribed sixty-day period. Citing *Consolidated-Andy*, *Midway*, and *Hoerner Waldorf*, the court below observed, "[*w*]*e are in agreement* with other circuits that courts of appeals have no jurisdiction to grant relief from a final OSHRC order unless a petition for review is filed within the sixty-day period following the date the order becomes final." App. 19a (emphasis added). See also § 11(a) of the Act, 29 U.S.C. § 660(a), discussed *supra*, at pp. 3-4. In the case at bar, the court recognized, it was "not confronted . . . with this problem. In this case, the petition for review was timely filed but the petitioners mistakenly [in the court's view] named the OSHRC as the respondent." [5]

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[5] Cyanamid attacks the court's distinction on the basis of cases barring additional *appellants* from joining an appeal after the time for noticing an appeal has expired. Petition, at 14. These cases require simply that an appellant notice an appeal within the time prescribed by law; if no appeal is taken on a particular appellant's behalf, he cannot gain admittance to court through another party's appeal. These cases are equivalent to those cases endorsed by the court below declining to grant relief to a party who has filed *no* petition for review within the statutory filing period. OCAW has filed a timely petition on its behalf, and has thus crossed the jurisdictional threshold established by all these cases and, more to the point, by § 11(a) of the Act.

As Cyanamid recounts, Petition, at 14, the court below remarked that in circumstances "similar" to those at bar, "some courts have held that the petition must be dismissed for failure to file timely." App. 19a (footnote omitted). The court's reference was to three district court decisions (dating from 1959-1961) construing 42 U.S.C. § 405(g)—which governed district court jurisdiction in Social Security suits, provided a limited waiver of sovereign im-

In permitting substitution of Cyanamid for the Commission, the court below was not countenancing any compromise in the jurisdictional requirements prescribed by the Act, which does not specify which party or parties must be named in a petition for review. See § 11(a), 29 U.S.C. § 660(a).[6] Because OCAW served Cyanamid with a copy of OCAW's petition at the time the petition was filed, and Cyanamid knew that but for confusion regarding the "identity of the proper respondent, the action would have been brought against it," the court below recognized Cyanamid's jurisdictional challenge as an exaltation of form over substance which, if accepted, "would defeat unjustly the union's opportunity to prove its case." App. 20a.

CONCLUSION

No special or important reasons exist for review by this Court of the decision below. The District of Colum-

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munity, and by its terms contemplated the participation of the Secretary of HEW as a party defendant in suits brought thereunder. These courts understood § 405(g) to establish as a jurisdictional prerequisite the naming of the Secretary of HEW as a defendant in Social Security suits. Thus, failure to sue the *Secretary* in the time for commencing suit required dismissal of the action. By contrast, § 11(a) of the Occupational Safety and Health Act does not establish as a jurisdictional requirement that any particular respondent be formally specified in a review petition. See text following this note; *cf. L.E. White* v. *United States*, 342 F.2d 481 (8th Cir. 1965) (distinguishing the aforementioned district court cases as inapplicable to administrative review proceeding, and holding that "failure of the petition to contain a proper caption [naming the proper respondent] would have to be regarded as being at most procedural carelessness or irregularity; it could not be held to constitute a jurisdictional defect"). In any event, as noted, these decisions were district court decisions. Cyanamid has cited no appellate decision even arguably at odds with the decision of the court below on the third issue presented for review.

[6] As already noted, OCAW named the Commission as a respondent pursuant to Rule 15(a), F.R.A.P., see *supra*, at p. 2, which specifies how petitions for review should be captioned.

bia Circuit correctly rejected Cyanamid's jurisdictional challenge. And, as we have shown, the decision below is in accord with the decisions on which Cyanamid relies except in immaterial respects. For all the reasons set forth herein, Cyanamid's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
1. Authority of a union intervenor to take up the prosecution of an OSHA citation where the Secretary has chosen not to pursue further action	2
2. Authority of the Commission to participate as a party in judicial review of its decisions	4
3. Failure to file a proper petition for review in timely fashion	5
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
Atlas Roofing Co. v. *OSHRC*, 430 U.S. 442 (1977)	3
Marshall v. *OCAW and OSHRC*, 647 F.2d 383 (3d Cir. 1981)	2
Marshall v. *OSHRC and OCAW*, 635 F.2d 544 (6th Cir. 1980)	2, 3
Marshall v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980)	2, 4
S & H Riggers & Erectors, Inc. v. *OSHRC*, 50 U.S.L.W. 2611, 10 O.S.H. Cas. (BNA) 1495 (5th Cir. Apr. 5, 1982)	4
UAW v. *OSHRC*, 557 F.2d 607 (7th Cir. 1977)	2
Whirlpool Corp. v. *Marshall*, 445 U.S. 1 (1980)	3
***OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970*:**	
Section 10(c), 29 U.S.C. § 659(c)	3
Section 11(a), 29 U.S.C. § 660(a)	3, 5
Section 11(b), 29 U.S.C. § 660(b)	5
***FEDERAL RULE OF APPELLATE PROCEDURE*:**	
Rule 15(a)	5
Rule 20	5
Rule 25(a)	5
Rule 26(a)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1784

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM

There is no reason why this Court should not grant the petition for a writ of certiorari. As set forth in the petition, the decision of the U.S. Court of Appeals for the D.C. Circuit[1] conflicts with decisions of other circuits with respect to each of the three questions presented, and the questions are important to the administration of the Occupational Safety and Health Act (the "Act"). Respondents Oil, Chemical and Atomic Workers International Union and its Local 3-499 ("OCAW") have argued in opposition that this case should not be of interest to this Court. They urge particularly that there is no conflict among the circuits regarding the right of a union intervenor to take up the prosecution of a citation where the Secretary of Labor (the "Secretary") has chosen not to pursue further action. OCAW's contention is in error, as the D.C. Circuit itself noted.

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[1] The D.C. Circuit's decision is now reported at 671 F.2d 643.

1. Authority of a union intervenor to take up the prosecution of an OSHA citation where the Secretary has chosen not to pursue further action.

In its decision, the D.C. Circuit noted that the position of petitioner American Cyanamid Company ("Cyanamid") regarding a union intervenor's inability to take up prosecution of a citation had support in the prior precedents. As the court observed:

> The [company's] position derives the bulk of its support from a recent decision of the Third Circuit, Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1186 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980). In that decision, the court sharply limited the scope of the employees or their union's party status in a proceeding initiated by the employer to the challenge of the length of the abatement period. It found that "any challenge advanced by an employee is limited to an attack on the reasonableness of the abatement period."
>
> Pet. App. A at 6a n.1.

OCAW nonetheless asserts that the D.C. Circuit's decision with respect to the first question presented does not conflict with decisions of the Third Circuit, *see Marshall* v. *OCAW and OSHRC*, 647 F.2d 383 (3d Cir. 1981); *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176 (3d Cir.), *cert. denied*, 449 U.S. 1061 (1980); or of the Sixth and Seventh Circuits, *see Marshall* v. *OSHRC and OCAW*, 635 F.2d 544 (6th Cir. 1980); *UAW* v. *OSHRC*, 557 F.2d 607 (7th Cir. 1977). OCAW claims these decisions concern only administrative proceedings before the Occupational Safety and Health Review Commission (the "Commission"), whereas the D.C. Circuit's decision concerns judicial review. OCAW Br. in Opp. at 3. This claimed distinction has no basis—in every case petitions for review to courts of appeals were involved. Two of the cases, *UAW* v. *OSHRC* and *Local 8-901, OCAW* v. *OSHRC* (the companion case to *Sun Petroleum*), involved petitions by union intervenors (one

by OCAW itself) for judicial review of Commission orders.

While each of the decisions involved its own factual circumstances, the essential question in all of them was whether a union which has intervened in enforcement proceedings before the Commission has rights independent of those of the Secretary to prosecute a citation. For example, in *Marshall* v. *OSHRC and OCAW*, the question was whether OCAW could continue a prosecution after the Secretary had chosen not to proceed further, the same question as in this case. Uniformly, the decisions by other circuits found that Sections 10(c) and 11(a) of the Act are interrelated in the Act's "detailed statutory scheme", *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 10 (1980), for enforcement of regulatory requirements. Under this scheme the Secretary is the exclusive prosecutor and brings enforcement actions "in which the Government sues in its sovereign capacity to enforce public rights". *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977). According to the other circuits, Sections 10(c) and 11(a) when read together as part of this scheme mean that a union intervenor cannot press on with a prosecution where the Secretary has decided to settle or abandon it.[2]

This case presents the only exception to the pattern of those cases. The D.C. Circuit held that the limits in Section 10(c) on union participation in enforcement proceedings are completely overridden by the general provisions in Section 11(a) regarding judicial review. The D.C. Circuit's decision is difficult to reconcile with the statutory scheme for enforcement, to the point where the D.C. Circuit imposed two conditions on union rights to pursue enforcement cases: (1) the union must notify the Secretary of its petition for review, such that the

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[2] Each decision has recognized that under the express terms of Section 10(c) a union may, independently of the Secretary, attack the reasonableness of the period set for abating a cited violation.

Secretary may have an opportunity to intervene, and (2) the union's petition may be mooted if the Secretary unconditionally states that he would not renew the prosecution regardless of the outcome on judicial review. Pet. App. A at 14a. Neither of these conditions has any basis whatsoever in the Act.

Thus, this case presents a direct conflict with the decisions of the Third, Sixth, and Seventh Circuits. The conflict is emphasized by the fact that the larger part of the D.C. Circuit's opinion with respect to this issue was taken virtually word for word from the dissenting opinion in *Sun Petroleum*. The conflict is inescapable and should be resolved by this Court.

2. Authority of the Commission to participate as a party in judicial review of its decisions.

Again, the circuits themselves have recognized the split in their decisions over the authority of the Commission to participate as a party in judicial review of its decisions.[3] OCAW maintains that the second question presented involves no live controversy, not because the circuits are not in conflict, but because OCAW assertedly takes no position with respect to the conflict. OCAW Br. in Opp. at 7. However, OCAW cannot now conveniently retreat from its original position that the Commission is both a proper respondent and the only necessary respondent. OCAW deliberately chose to name in its petition for review only the Commission as a respondent, knowing full well of the conflict among the circuits as to whether the Commission can participate in judicial review of its decisions. Unless OCAW now admits that its petition for review named no proper respondent,

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[3] In addition to the decisions cited in the petition, see *S & H Riggers & Erectors, Inc.* v. *OSHRC*, 50 U.S.L.W. 2611, 10 O.S.H. Cas. (BNA) 1495, 1497 (5th Cir. Apr. 5, 1982) (referring to "this tension in the caselaw").

OCAW must defend its position that the Commission is a proper party on judicial review of its decisions.

The issue of proper party respondent has a practical effect in this case, since it bears on the circuit in which the petition for review properly may be heard. Had the Secretary petitioned for review, under Section 11(b) of the Act he could only have filed his petition in the Third Circuit, where Cyanamid's principal place of business is located, or in the Fourth Circuit, where the violation allegedly occurred. If OCAW had initially named Cyanamid as a respondent, not only would its attempt to stand in the shoes of the Secretary have been too obvious, but it also arguably would have had the effect of limiting filing to either the Third or Fourth Circuits under Section 11(b). In naming only the Commission as a respondent, OCAW established a colorable claim for proceeding under Section 11(a), which allows the petition to be filed in the D.C. Circuit.[4] As a result, Cyanamid has been forced to participate in a circuit in which it could not otherwise have been made to appear, the D.C. Circuit.

3. Failure to file a proper petition for review in timely fashion.

The D.C. Circuit had utterly no basis to relate back OCAW's untimely motion to substitute Cyanamid as a respondent in place of the Commission. The Federal Rules of Appellate Procedure and cases construing those rules are precise: where jurisdiction is involved, a court has authority to relate an amendment necessary to cure a defective filing back to the date of the defective filing only to the extent expressly permitted by rule or statute. The rules applicable here, Fed. R. App. P. 15(a), 20, 25(a), and 26(a), contain no such express allowance. The D.C. Circuit's decision to relate OCAW's untimely motion back to the time of filing of the faulty petition for review thus directly conflicts with the decisions of other circuits holding that the failure to file a proper

[4] Given its position in filing its petition for review, OCAW could hardly have named the Secretary as the respondent.

petition for review of an agency order in timely fashion is a jurisdictional bar to consideration of the petition.

The D.C. Circuit's decision to grant the untimely motion to amend the petition for review has practical consequences; this is not some technical irregularity without substance, such as naming the wrong official of the federal government, as OCAW suggests. OCAW Br. in Opp. at 8-9. Here the D.C. Circuit substituted a private party for a governmental entity. As a result, well after the jurisdictional period for filing petitions for review had expired, Cyanamid became the sole respondent in a case in a circuit in which it could not otherwise have been made a respondent at all. And, ironically, OCAW was nonetheless also able to step into the shoes of the Secretary to become in effect a private prosecutor.

The third question presented is important not only because the D.C. Circuit's decision conflicts with the decisions of other courts of appeals, but because it contravenes the Federal Rules of Appellate Procedure on a matter as to which both courts and litigants have the right to expect precision.

CONCLUSION

For these reasons, as well as those discussed in the petition, the petition for a writ of certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN CYANAMID COMPANY, PETITIONER

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 3-499, OIL, CHEMICAL AND ATOMIC WORKERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a court of appeals has jurisdiction under Section 11(a) of the Occupational Safety and Health Act, 29 U.S.C. 660(a), to consider a petition for review of an order of the Occupational Safety and Health Review Commission filed by a union that was a party in administrative enforcement proceedings brought by the Secretary of Labor against an employer, where no other party has sought review.

2. Whether the Occupational Safety and Health Review Commission may participate as a party in the court of appeals on a petition for review of its decision.

3. Whether, in the circumstances of this case, a petition for review that was filed within the 60-day period prescribed by 29 U.S.C. 660(a) but that incorrectly named the Commission as respondent may be amended after the 60-day period to substitute the employer as respondent.

TABLE OF CONTENTS

	Page
Statement	1
Argument	8
Conclusion	16

TABLE OF AUTHORITIES

Cases:

American Construction Co. v. *Jacksonville Ry.*, 148 U.S. 372	9
B.J. McAdams, Inc. v. *ICC*, 551 F.2d 1112	14
Brennan v. *Gilles & Cotting, Inc.*, 504 F.2d 1255	12
Browder v. *Director, Illinois Department of Corrections*, 434 U.S. 257	14
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327	9
Consolidated-Andy, Inc. v. *Donovan*, 642 F.2d 778	13
Goldstein v. *Cox*, 396 U.S. 471	9
Hamilton-Brown Shoe Co. v. *Wolf Brothers & Co.*, 240 U.S. 251	9
Hoerner Waldorf Pan American Bag Co., Inc. v. *OSHRC*, 614 F.2d 795	13
International Union, United Auto Workers v. *OSHRC*, 557 F.2d 607	10, 11
Life Time Doors, Inc. v. *Walled Lake Door Co.*, 505 F.2d 1165	13
Marshall v. *Oil, Chemical & Atomic Workers*, 647 F.2d 383	9, 10
Marshall v. *OSHRC*, 635 F.2d 544	10, 12
Marshall v. *Sun Petroleum Products Co.*, 622 F.2d 1176, cert. denied, 449 U.S. 1061	9, 10
Microwave Communications, Inc. v. *FCC*, 515 F.2d 385	14
Midway Industrial Contractors, Inc. v. *OSHRC*, 616 F.2d 346	13, 14
Penwell v. *Newland*, 180 F.2d 551	14
United States v. *Bankers Trust Co.*, 294 U.S. 240	12
United States v. *Nixon*, 418 U.S. 683	12

Cases—Continued	Page
United States v. *Robinson*, 361 U.S. 220	14
United States v. *United Mine Workers*, 330 U.S. 258	12
Van Hoose v. *Eidson*, 450 F.2d 746	14
Statutes, regulation and rule:	
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*	2
Section 4(b)(1), 29 U.S.C. 653(b)(1)	3
Section 5(a)(1), 29 U.S.C. 654(a)(1)	2
Section 8(f)(1), 29 U.S.C. 657(f)(1)	2
Section 9(c), 29 U.S.C. 658(c)	3
Section 10(c), 29 U.S.C. 659(c)	4, 5
Section 11(a), 29 U.S.C. 660(a)	3, 4, 13
Section 11(b), 29 U.S.C. 660(b)	13
Section 12(i), 29 U.S.C. 661(i)	3
28 U.S.C. 1254(1)	12
29 C.F.R. 2200.20(a)	2
Fed. R. App. P.:	
Rule 3(c)	14
Rule 4(a)	14
Rule 15(a)	14
Fed. R. Civ. P. 15(c)	15
Miscellaneous:	
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978)	12

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

In December 1978, the Oil, Chemical and Atomic Workers International Union ("OCAW") complained to the Secretary of Labor that petitioner was violating the Occupational Safety and Health Act of 1970,

29 U.S.C. 651 *et seq.*, by implementing its "Fetus Protection Policy" at its Willow Island, West Virginia, plant (Pet. App. 3a).[1] The Secretary thereafter conducted an inspection of the plant (see 29 U.S.C. 657(f)(1)) and issued a citation alleging that implementation of petitioner's policy violated the Act's general duty clause (29 U.S.C. 654(a)(1)) (Pet. App. at 3a-4a).[2] Petitioner filed a timely notice of contest, and the Secretary issued a complaint (*id.* at 54a).

OCAW elected to participate as a party in the hearing on the citation before the Occupational Safety and Health Review Commission ("OSHRC" or the "Commission") (Pet. App. 4a). See 29 C.F.R. 2200.20(a). Petitioner then moved for summary judgment, and the administrative law judge to whom the case had been assigned granted the motion and dismissed the Secretary's citation. The ALJ relied

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[1] Cyanamid's Fetus Protection Policy was adopted and implemented at Willow Island in 1977. It precluded female employees of presumed child bearing age from being assigned to, bidding into, or holding any production job involving occupational exposure to toxic substances identified as harmful to the fetus. Any female production worker who failed to provide evidence of permanent infertility by April 1978 would have to request a transfer to one of three departments where toxic substances were not used. Solely in order to retain their production jobs, five women underwent voluntary sterilization. Two women of presumed child bearing capacity who were not sterilized transferred from production positions to the utility pool with subsequent loss of pay and benefits (Pet. App. 3a).

[2] The general duty clause requires every employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" (29 U.S.C. 654(a)(1)).

on two independent grounds: (1) that the citation was barred by the Act's six-month statute of limitations (29 U.S.C. 658(c)); and (2) that the Secretary's jurisdiction with respect to the hazard alleged in this case was precluded under Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), by previous regulatory actions of the Equal Employment Opportunity Commission and the National Labor Relations Board (Pet. App. 4a, 55a, 57a-62a).

The Secretary and OCAW petitioned the full Commission under 29 U.S.C. 661(i) for discretionary review of the administrative law judge's decision (Pet. App. 4a). The Commission granted review but affirmed the dismissal of the citation on yet a third ground: that the citation did not allege the existence of a "hazard" within the meaning of the general duty clause (Pet. App. 21a-32a).[3]

Pursuant to Section 11(a) of the Act, 29 U.S.C. 660(a), OCAW filed a petition for review of the Commission's decision in the court of appeals within the 60-day period prescribed by that statute (Pet. App. 4a). The Secretary elected not to file a petition (*ibid.*). OCAW named the Commission as respondent and simultaneously served a copy of its petition on petitioner (*id.* at 4a, 20a).

Petitioner thereafter moved to intervene and to dismiss the OCAW petition, arguing that the Act denied OCAW the right to appeal the dismissal of the citation and that the Commission—the only named respondent—was without power to defend its decision in court (Pet. App. 4a, 15a). Petitioner maintained that any right to judicial review con-

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[3] In light of its disposition, the Commission did not consider either ground upon which the administrative law judge had relied in granting summary judgment (Pet. App. 32a n.27).

ferred upon employees by Section 11(a) of the Act, 29 U.S.C. 660(a), is limited by Section 10(c) of the Act, 29 U.S.C. 659(c), to contesting the reasonableness of the abatement date in the Secretary's citation (Pet. App. 4a, 5a).[4] OCAW thereafter moved to add

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[4] Section 11(a), 29 U.S.C. 660(a), provides in pertinent part:

> Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28.

Section 10(c), 29 U.S.C. 659(c), provides:

> (c) If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 958(a) of this title, any employee or representative of employees files a notice with the Secretaray alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, but without regard to subsection (a) (3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a show-

petitioner as respondent (*id.* at 15a). The Secretary filed an amicus curiae brief solely addressed to, and in support of, OCAW's right to appeal. The court of appeals thereafter denied petitioner's motion to dismiss and granted OCAW's motion to amend.

The court of appeals rejected petitioner's contention that Section 10(c) limits employees' appeal rights solely to issues relating to the reasonableness of the abatement date in the Secretary's citation (Pet. App. 6a). Instead, the court held that when a union or employee elects to become a party in an employer-initiated hearing before the Commission, the union is "any person 'adversely affected or aggrieved' " by an adverse Commission decision and therefore is entitled to seek review in the court of appeals (*id.* at 10a).

The court of appeals began by noting that Section 10(c) of the Act, 29 U.S.C. 659(c), provides for two distinct types of hearings (Pet. App. 6a). The first is triggered by an employer's notice of contest of the Secretary's citation. Section 10(c) expressly authorizes employees and their representatives to participate as parties at such hearings (*ibid.*). The second type of hearing is triggered when employees notify the Secretary of their contention that the abatement date in the citation is unreasonable. This type of

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ing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

hearing, the court noted, is "tied to the agenda set by statute: contesting the reasonableness of the abatement period" (*id.* at 7a). By contrast, the court observed (*ibid.*; emphasis in original), "[n]othing in the text of the statute * * * so confines employee/union participation as 'parties' in the first type of hearing—that initiated by the *employer* to contest a citation." The court also remarked (*ibid.*) that, in light of the critical role assigned employees in the initial stages of the Act's enforcement,[5] it would be an anomaly if, as petitioner suggested, that role ceased at the instant the employees elected party status. Rather, the court stated (*id.* at 8a), "[b]y permitting employees to elect party status, and not qualifying this status with the same limits imposed on the employees' initiation of commission proceedings, it is apparent that Congress intended to

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[5] The court described this role as follows (Pet. App. 7a-8a; footnotes omitted):

> Typically, as demonstrated by the instant case, an employee who believes a violation exists that threatens physical harm may request an inspection by giving the Secretary written notice. 29 U.S.C. § 657(f)(1). If, upon receipt of such notification, the Secretary determines there are reasonable grounds to believe a violation exists, he must conduct a special inspection as soon as possible. *Id.* A representative authorized by the employees shall be given the opportunity to accompany the Secretary or his representative during the physical inspection of the workplace. *Id.* § 657(e). If the Secretary believes that the employer has violated any portion of the Act, "he shall with reasonable promptness issue a citation to the employer." *Id.* § 658. The employer may then contest the citation if he disputes the Secretary's finding of a violation flowing from an investigation initiated by employees. At the hearing initiated by the employer, the employees may elect party status. *Id.* § 659(c).

continue the broad scope of employee participation in the enforcement of the Act through the adjudicative stages." The court noted that its conclusion was fully consonant with the Act's legislative history (*id.* at 8a-11a).

The court of appeals stressed (Pet. App. 12a) that its decision did not in any way impinge upon the Secretary's "unique role in administering the Act." The court stated (*ibid.*) that "enforcement of the Act is the sole responsibility of the Secretary. He is the exclusive prosecutor of OSHA citations." Therefore, the court said, OCAW had "no right to challenge the determination of the Secretary not to appeal" a case (Pet. App. 13a). The court noted (*ibid.*), however, that "[i]n this instance, OCAW is not seeking review of the Secretary's decision; instead, it is seeking judicial review of an order of the OSHRC, an independent adjudicative body (*ibid.*). Consequently, the union's right to seek judicial review is subject to two conditions derived from "the general statutory scheme and purpose of the Act" (*id.* at 14a). First, the union must notify the Secretary whenever it petitions for review, so that he may intervene if he thinks it appropriate. Second, any petition filed by the union may become moot whenever the Secretary provides the court with a clear statement that he will not prosecute the case regardless of its decision (*ibid.*).

The court of appeals agreed with petitioner that the OSHRC is not a proper party respondent in proceedings to review its decisions (Pet. App. 15a). The court concluded that the Commission was established solely to adjudicate disputes arising from the Secretary's citations and has no enforcement authority. As a purely adjudicative body, the court observed, the Commission is like a district court, which

does not defend its decisions on appeal (*id.* at 17a). On the other hand, the court concluded, the employer, whose interest is plainly adverse to that of the union, is a proper party respondent to the union's appeal (*id.* at 18a). The court therefore dismissed the OSHRC as a party and granted the union's motion to amend the caption to substitute the employer as party respondent (*id.* at 20a).[6]

ARGUMENT

1. This case is not ripe for review by this Court. The court of appeals has merely determined the proper parties in the proceeding pending before it; the court has not yet decided the merits of the union's claim that the Secretary's complaint stated a cause of action under the Act's general duty clause. If the court disagrees with OCAW and upholds the decision of the OSHRC, petitioner will have no need for relief from this Court. On the other hand, if the court finds that a claim was stated, the case will have to be remanded, and assuming there is no procedural bar to prosecution of the claim, OSHRC will have to determine whether petitioner committed a violation.[7] If a violation is found at the administrative level, petitioner will be free to contest the OSHRC's order in the court

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[6] The court declined to decide whether the employer is the only proper party respondent in such proceedings and expressed no opinion whether the Secretary could participate as respondent (Pet. App. 18a n.13).

[7] The Commission has considered only the "threshold issue" of whether a claim was stated. It has expressly declined to consider whether a violation occurred (Pet. App. 24a n.6) or whether the procedural grounds upon which the administrative law judge relied warranted dismissal (*id.* at 32a n.27).

of appeals. And if petitioner loses in that forum, it will be able to file a petition for a writ of certiorari raising the issues in its present petition together with whatever other issues may have been decided adversely to it. Thus, denial of review at this time will not irreparably prejudice petitioner, and subsequent proceedings may well obviate any need for such review. There is, accordingly, no reason for this Court to depart from its usual practice of declining to review nonfinal orders of the courts of appeals. *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970) ("[T]his Court above all others must limit its review of interlocutory orders."); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893).

2. In any event, review is unwarranted because those portions of the decision below on which petitioner did not prevail do not conflict with any decision of this Court or of any other court of appeals.

a. Petitioner contends (Pet. 6-9) that the decision below upholding the union's right to seek review of the Commission's ruling conflicts with the decisions of three other circuits, but the cases upon which petitioner relies are readily distinguishable. In *Marshall* v. *Sun Petroleum Products Co.*, 622 F.2d 1176, 1184-1186 (3d Cir.), cert. denied, 449 U.S. 1061 (1980), the court held that employees could not challenge the method of abatement upon which the Secretary and the employer had agreed in settling the employer's contest of a citation. Similarly, in *Marshall* v. *Oil, Chemical & Atomic Workers*, 647 F.2d 383 (3d Cir. 1981), the court held that employees could not contest a term of a settlement agreement stating that the condition that had led to the citation had already been abated.

It seems clear that if the court below had been presented with a situation similar to those in the above cases it would have reached the same result as did the Third Circuit. In the present case, the court of appeals concluded (Pet. App. 14a) that employees may not maintain a petition for review of an order of the OSHRC if the Secretary advises the court that he will not prosecute the claim regardless of the court's decision. The court explained (*id.* at 13a) that while employees may seek review of an order of the OSHRC, "an independent adjudicatory body," they may not challenge the Secretary's exercise of prosecutorial discretion. Thus, since the settlements challenged by the employees in *Sun Petroleum Co.* and *Marshall* v. *Oil, Chemical & Atomic Workers* represented the exercise of the Secretary's prosecutorial discretion, the court below would have held that the employees had no right to be heard.

In *Marshall* v. *OSHRC*, 635 F.2d 544 (6th Cir. 1980), the court held that employees could not prosecute a citation that had been vacated on the Secretary's motion. As noted, the court of appeals in the present case stated (Pet. App. 14a) that employees may not obtain review of an adverse OSHRC order if the Secretary advises the court that he has decided not to prosecute the claim no matter what the court's decision. The Secretary's motion to vacate the citation in *Marshall* v. *OSHRC* on the ground that no violation had occurred was tantamount to such a statement, and it is therefore apparent that the court below would have reached the same result as the Sixth Circuit did.

Finally, in *International Union, United Auto Workers* v. *OSHRC*, 557 F.2d 607 (7th Cir. 1977), the union contested the Secretary's citation on the ground that the time provided for submitting

an abatement plan was unreasonable. The employer did not initially contest the citation but subsequently filed an objection after the abatement period was shortened. The court held (*id.* at 610) that under these circumstances the OSHRC could consider only whether the abatement date was reasonable and not whether the employer's abatement plan was sufficient.

In the present case, the court of appeals stated (Pet. App. 6a-7a) that when an OSHRC "hearing is triggered by employees who notify the Secretary of their contention 'that the period of time fixed in the abatement to citation is unreasonable' * * * the agenda [is] set by statute: contesting the reasonableness of the abatement period." Because the hearing in *International Union, United Auto Workers* v. *OSHRC* fell into that category and was not a hearing "triggered by an employer who notifies the Secretary of an intention to contest a citation" (Pet. App. 6a), it is clear that the court below would have agreed that the union had no right to contest the sufficiency of the abatement plan.

In sum, petitioner is incorrect in contending that there is a conflict among the circuits, because no other court has considered the precise question presented here. Moreover, the decision below, by recognizing the Secretary's paramount enforcement authority, is consistent in reasoning with the cases upon which petitioner relies. In any event, the situation involved here does not arise frequently. For these reasons, a union's right to petition for review under the circumstances present in this case is not a question that warrants review by the Court at this time.

b. Although there is a sharp division among the circuits respecting whether the Commission is a proper party to defend its decision in the court of

appeals, that issue should not be reviewed in this case. Petitioner prevailed on this issue in the court of appeals (see Pet. 10), and neither the Commission, the Secretary,[8] nor OCAW has sought review. Although 28 U.S.C. 1254(1) permits "any party" in the court below to file a petition for a writ of certiorari, to our knowledge this Court has entertained or granted petitions filed by prevailing parties only in the unusual circumstances of certiorari before judgment in the court of appeals. See *United States* v. *Nixon*, 418 U.S. 683, 686-687 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 243 (1935). "In such circumstances, however, the petition amounts to a request to transfer an appeal from one appellate court to another, not to an appeal by the party who has prevailed in the court immediately below the Supreme Court." R. Stern & E. Gressman, *Supreme Court Practice* § 6.17, at 434 (5th ed. 1978). Moreover, in those cases the issue "appealed" by the prevailing party was the subject of dispute between the litigants; here, no party has taken issue with the court of appeals' ruling. See Br. in Opp. 7 ("OCAW is indifferent as to whether the Commission has party status").[9]

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[8] Indeed, the Secretary has sought the dismissal of the Commission as a party on a number of occasions. See, *e.g.*, *Marshall* v. *OSHRC*, *supra*, 635 F.2d at 547; *Marshall* v. *Sun Petroleum Products Co.*, *supra*, 622 F.2d at 1180; *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1266 (4th Cir. 1974). However, the Secretary appeared only as amicus curiae in the proceedings below and took no position on the Commission's status.

[9] As petitioner notes (Pet. 10 n.8), whether the OSHRC was a proper party might be significant if the court of appeals had erred in permitting OCAW to amend its petition to name petitioner as a respondent. As we show below, however, amend-

c. Petitioner erroneously asserts (Pet. 12) that the decision below permitting OCAW to amend its petition to name petitioner as respondent conflicts with decisions of three other circuits. In each of the cases upon which petitioner relies, the court held that jurisdiction was lacking because *no* petition for review had been filed within the 60-day limitations period set forth in Section 11(a) of the Act, 29 U.S.C. 660(a). See *Consolidated-Andy, Inc.* v. *Donovan*, 642 F.2d 778, 779 (5th Cir. 1981); *Midway Industrial Contractors, Inc.* v. *OSHRC*, 616 F.2d 346, 347 (7th Cir. 1980); *Hoerner Waldorf Pan American Bag Co., Inc.* v. *OSHRC*, 614 F.2d 795, 796 (1st Cir. 1980). The court below expressly approved those decisions (Pet. App. 19a) but explained that the present case posed a different question, since OCAW's petition was filed within the 60-day period.

Petitioner contends (Pet. 14) that the distinction drawn by the court of appeals is not valid and relies upon cases holding that a defective notice of appeal may not be cured by moving to add a necessary appellant after the period for filing a notice of appeal has expired. See *Life Time Doors, Inc.* v. *Walled Lake Door Co.*, 505 F.2d 1165, 1168 (6th Cir.

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ment in the circumstances of this case was proper and consistent with the decisions of other circuits. Petitioner also suggests (Reply Mem. 5) that if the OSHRC had been named as respondent OCAW would have been compelled to seek review under Section 11(b), 29 U.S.C. 660(b), rather than Section 11(a), 29 U.S.C. 660(a). Section 11(b) vests jurisdiction solely in the "court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office" (here, the Third or Fourth Circuits), while Section 11(a) also confers jurisdiction upon the District of Columbia Circuit. Petitioner's argument is frivolous. Section 11(b) applies only to petitions filed by the Secretary, while Section 11(a) governs petitions filed by any other aggrieved party.

1974); *Van Hoose* v. *Eidson*, 450 F.2d 746, 747 (6th Cir. 1971); *Penwell* v. *Newland*, 180 F.2d 551, 553 (9th Cir. 1950). It is apparent, however, that the situation presented by such cases is significantly different from that involved here. The timely filing of a notice of appeal or petition for review is a jurisdictional requirement. *Browder* v. *Director, Illinois Department of Corrections*, 434 U.S. 257, 264 (1978) (notice of appeal); *United States* v. *Robinson*, 361 U.S. 220, 229 (1960) (notice of appeal); *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112, 1114 (8th Cir. 1977) (petition for review); *Microwave Communications, Inc.* v. *FCC*, 515 F.2d 385, 388-389 (D.C. Cir. 1974) (petition for review). Thus, jurisdiction is lacking if no party entitled to seek appellate review files a notice of appeal or a petition for review within the period prescribed by law. By contrast, petitioner has cited no authority for the proposition that designation of a proper respondent in a petition for review is a jurisdictional necessity. In the case of a notice of appeal, for example, the Federal Rules of Appellate Procedure do not even prescribe that the appellees be listed (see Rule 3(c)).[10]

The only issue before the court of appeals, therefore, was whether to permit OCAW's amendment, and that was a matter that lay within the court's sound discretion. The Federal Rules of Appellate

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[10] Petitioner also argues (Pet. 12-13) that the decision in the instant case conflicts with the Seventh Circuit's holding in *Midway Industrial Contractors Inc.* v. *OSHRC*, *supra*. There, the court declined to read into Fed. R. App. 15(a) a provision like that contained in Fed. R. App. P. 4(a), which permits the district courts to extend the time for filing a notice of appeal in cases of excusable neglect. The instant case, however, does not present the issue addressed by the Seventh Circuit, since OCAW's petition was timely filed.

Procedure do not address this question, but the Federal Rules of Civil Procedure provide an apt analogy. Where a timely pleading in a civil case fails to name the proper party against whom a claim is asserted, Rule 15(c) permits an amendment naming that party and relating back to the original pleading, provided that the party to be added "has received such notice of the institution of the action that he will not be prejudiced" and "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." The annotations to the Rule make clear, moreover, that "[r]elation back is intimately connected with the policy of the statute of limitations [and that] the policy of the statute limiting the time for suit [is not offended where the requirements of rule 15(c) are met]". Here, the court of appeals found that the requirements for a relation back amendment had been met, and petitioner does not contest that conclusion. Petitioner was served within the limitations period; it had notice of the action; and it knew that it would have been the named respondent but for OCAW's mistake (Pet. App. 20a). In such circumstances, permitting OCAW's amendment did not offend the letter or spirit of the Act's statute of limitations.[11]

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[11] The court of appeals observed (Pet. App. 19a n.14) that its decision was contrary to a number of district court cases in which petitions for review were dismissed in analogous circumstances. However, all those cases were decided before the 1966 amendments to Fed. R. Civ. P. 15(c). As the annotations to the rule make clear, the new amendments were enacted to avoid the results in those cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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